IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LOCAL 17 INTERNATIONAL ASSOC. OF
BRIDGE & IRON WORKERS INS. FUND,
Civil Action No.
Plaintiff,
1:97CV1422
Akron Ohio
vs.
VOLUME 14
PHILIP MORRIS, INC, ET AL,
Defendants.

TRANSCRIPT OF JURY TRIAL HAD BEFORE
THE HONORABLE JAMES S. GWIN,
UNITED STATES DISTRICT JUDGE,
ON THURSDAY, MARCH 11, 1999, AT 8:00 A.M.

APPEARANCES:

For the Plaintiff: PATRICK J. COUGHLIN, ESQ.
Milberg, Weiss, Bershad,
Hynes & Lerach
600 West Broadway, Suite 1800
San Diego, CA 92101

JONATHAN D. ROWE, ESQ.
Soble & Rowe
301 E. Liberty Street, Suite 250
Ann Arbor, Michigan 48104
(734) 662-9252

PAUL STRITMATTER, ESQ.
MICHAEL E. WITHEY, ESQ.
Stritmatter Kessler Whelan Withey
1200 Market Place Tower
2025 First Avenue
Seattle, WA 98121

ROGER M. ADELMAN, ESQ.
Suite 730
1100 Connecticut Ave, N.W.
Washington, D.C. 20036.

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1 For Philip Morris, Inc.: BRADLEY E. LERMAN, ESQ.
GEORGE LOMBARDI, ESQ.
2 Winston & Strawn
35 Wacker Drive
3 Chicago, Illinois
60601-9703

4 For Lorillard Tobacco Co.: GARY R. LONG, ESQ.
GREGORY FOWLER, ESQ.
5 Shook, Hardy & Bacon
One Kansas City Place
6 1200 Main Street
Kansas City, MO 64105-2118
7
For RJR Nabisco, ROBERT C. WEBER, ESQ.
8 Inc.: PETER J. BIERSTEKER, ESQ.
Jones Day Reavis & Pogue
9 North Point 901 Lakeside
Cleveland, OH 44114-1190
10
For Brown & Williamson DAVID BERNICK, ESQ.
11 and BATCo: Kirkland & Ellis
200 East Randolph Drive
12 Chicago, IL 60601

13

14

15

16

17

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19

20

21 Official Court Reporters: Richard G. DelMonico
Heidi Blueskye Geizer
22 404 U.S. District Court
2 South Main Street
23 Akron, Ohio 44308
(330) 535-2280

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24 Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.
25

1 MORNING SESSION, THURSDAY, MARCH 11, 1999 8:00 A.M.

2 (Proceedings in courtroom out of the presence of the jury:)

3 MR. ADELMAN: Your Honor, we have matters

4 pertaining to Mr. Viscusi and also to Dr. Scheffman we think

5 it's appropriate to raise now. I'll speak to the Scheffman

6 issue, if I can.

7 THE COURT: Okay.

8 MR. BERNICK: I can't address Scheffman.

9 MR. BIERSTEKER: Mr. Weber is the person

10 responsible.

11 THE COURT: Where is he?

12 MR. BIERSTEKER: He should be here momentarily.

13 THE COURT: Why don't we go to the other issue.

14 MR. WITHEY: Your Honor, on Dr. Viscusi, who is

15 the next witness, there is four issues related to his direct

16 exam. First is we had brought a motion in limine to exclude

17 testimony regarding a survey that he had conducted for which

18 there are lost survey instruments, including the return

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19 questionnaire. I don't know if the Court has had an

20 opportunity --

21 THE COURT: I haven't seen that.

22 MR. WITHEY: We filed it with our original

23 documents a long time ago, so I understand. I should have

24 yesterday addressed that.

25 Three other things. It is a very short report. We

1 want to make sure he doesn't go beyond the report. And

2 counsel has confirmed there won't be any discussion of

3 damages or cost shifting with this witness.

4 So we want on the record to make sure we understand

5 that there is some significant limitations to Dr. Viscusi's

6 testimony.

7 THE COURT: Okay.

8 MR. BIERSTEKER: He's correct about the

9 representations as to the scope of his testimony, and --

10 THE COURT: What about the survey?

11 MR. BIERSTEKER: Well, it is true that some of the

12 completed questionnaires are not available any longer;

13 however, this has been a subject of his academic writings

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14 and has appeared in the peer reviewed published literature.

15 It is no different than Dr. Pierce or somebody else standing

16 up and talking about a survey they conducted that was in the

17 peer reviewed published literature. We don't have the

18 questionnaires for any of the surveys.

19 THE COURT: What are the questionnaires?

20 MR. WITHEY: The questionnaires were

21 propounded -- he did a telephone survey in 1991 with 200

22 respondents in North Carolina, encoded the questionnaires; I

23 mean, he had someone take the survey answers, record them,

24 and so we don't have the basis of going back and basically

25 auditing or reviewing his survey answers to verify that it

1 was correct.

2 The only thing that appeared in peer review literature

3 was the results, and we asked for and were not given 160 of

4 the returned questionnaires, and we believe that the

5 reliability of that survey is in question, and we brought a

6 motion under Rule 703, that without the proof of the

7 reliability then of that survey which he relies upon in

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8 every slide, if they had wanted to get Dr. Pierce's --

9 THE COURT: What do the questions deal with? What

10 does the questionnaire deal with?

11 MR. WITHEY: The basic question is, out of a

12 hundred smokers, how many would die of, A, lung cancer; how

13 many would die of lung cancer and other diseases.

14 Those are two basic questions. And then there is some

15 background questions, and the answers are significant,

16 because first of all there was -- we need to prove that

17 there was more women in that survey than there were men in

18 the general population; we need to prove that the answers

19 given were actually consistent with our belief, that is,

20 that the question -- first question suggested the answer to

21 the second question. There is a whole series of

22 methodological problems that we will --

23 THE COURT: You have some of the questionnaires,

24 don't you?

25 MR. WITHEY: We have 40 out of 160.

1 THE COURT: Why would the questionnaires for the

2 others differ from the --

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3 MR. WITHEY: The questions won't differ but the

4 answers will, and the coding of the answers is important.

5 THE COURT: I would be inclined to deny that

6 portion of the motion.

7 MR. WITHEY: Thank you, Your Honor.

8 (Discussion off the record.)

9 MR. ADELMAN: Would Your Honor hear us on

10 Scheffman? Dr. Scheffman is the second witness this

11 morning, and we've received large number of demonstratives

12 from the defense which gives rise to two points I think Your

13 Honor can rule on.

14 We've got something on the order of 15 demonstratives,

15 Your Honor, about international matters. Dr. Scheffman is

16 here to testify, as I understand it, about the conspiracy.

17 The conspiracy we have alleged in the complaint does not

18 leave the United States, it only covers the United States,

19 so we object and ask to exclude any testimony or documents

20 regarding international matters.

21 I can hand up the visuals, Your Honor, but basically

22 there are apparently in the offing visuals and testimony

23 about cigarette purchases, and so forth, in large number of

24 countries, and that has nothing do with this case as we

25 brought it.

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1 We bring the charges, we've joined the issue, and we

2 think it is irrelevant.

3 That's the first point.

4 MR. WEBER: Okay. There is no merit to that

5 whatsoever. They have alleged a conspiracy. They say that

6 they contest it the way they said they could with their

7 theories about it being domestic.

8 We have had testimony, I cross-examined without

9 objection each of their witnesses about whether or not they

10 had examined whether international companies were in the

11 conspiracy. We did it with Dr. Jaffe, we did it with Dr.

12 Harris, about product development overseas. That's all we

13 are going to do.

14 THE COURT: What's the theory?

15 MR. WEBER: What's the what?

16 THE COURT: What's the theory?

17 MR. WEBER: The theory that we have?

18 THE COURT: Yes. Just what this witness is going

19 to testify to.

20 MR. WEBER: What this witness is going to say in

21 part, and it's less than 15 exhibits, to be sure, but there

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22 are probably five, six, seven exhibits that he's going to

23 use to say, look, if the conspiracy were what they said it

24 was, and indeed, Dr. Harris himself said he thought it might

25 be an international conspiracy, he's going to say if the

1 theory is what they say it is, you look at these

2 international experiences, see what the smoking rate is, see

3 what the product development rate is. Did anybody make a

4 safer cigarette overseas? I've looked, the answer is no.

5 That's a direct challenge to their proof.

6 They can't say we're going to define it this way and

7 you can't challenge.

8 THE COURT: That's what you expect his testimony

9 would be?

10 MR. WEBER: Yes.

11 MR. ADELMAN: Your Honor, I have the first

12 paragraph of the complaint, it says throughout the United

13 States.

14 THE COURT: I understand, but I think it's got

15 some relevance as to whether --

16 MR. ADELMAN: If I may be heard on that.

17 We're trying this conspiracy, we brought

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it, we're

18 defending. They can attack it as they see fit. But there

19 are 16, count them if you will, exhibits on various things

20 international.

21 MR. WEBER: There are not that many that are going

22 to be used.

23 MR. ADELMAN: I have them in my hand.

24 MR. WEBER: There are not that many that are going

25 to be used.

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1 MR. ADELMAN: Be that as it may, they can't just

2 create a straw man on cross-examination and try to rebut

3 it. That's what counsel talking about. He may have asked

4 questions about international conspiracy --

5 THE COURT: I understand, but I think the point

6 goes to whether if conduct overseas is similar to the -- if

7 your allegation is that there's a conspiracy here, if the

8 results overseas are similar where there's no

9 argument, where there's no showing of conspiracy, then I

10 think it gives some weight to the opinion as to whether a

11 conspiracy had effect here.

12 MR. ADELMAN: Well, our position, of course, is

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13 what we have charged is a domestic conspiracy under

14 different circumstances.

15 THE COURT: I understand that, but the issue is

16 that if there's overseas conduct that plays into the -- I

17 think it's a way to test the theory of a local conspiracy.

18 MR. ADELMAN: Our view is that it's irrelevant,

19 because there are obviously different circumstances in other

20 parts of the world, different political systems, different

21 government regulations, and the like.

22 THE COURT: Okay. Well, I think that goes to

23 weight more than goes to the admissibility. And I'm not

24 saying you can't cross-examine them on these issues, but I

25 think it's at least the showing that's been made to say, so

1 far, I think it is probably admissible.

2 MR. ADELMAN: The other point, Your Honor, is with

3 regard to Dr. Scheffman. The Court has dismissed the

4 antitrust counts, and we want to insure that he does not

5 testify on antitrust matters.

6 He, both in his deposition and in the demonstratives we

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7 see, apparently is going to give antitrust testimony. We

8 object to that, as well.

9 THE COURT: Okay. Well, I'm alerted to that, and

10 stay away from that.

11 MR. WEBER: It's been the same issues their

12 experts had. We are just going to deal with the

13 conspiracy.

14 THE COURT: We'll reconvene as soon as we get a

15 juror. Which one is it?

16 THE CLERK: Number five.

17 (Discussion off the record.)

18 THE COURT: One of the jurors is not here, I

19 believe juror number five. We have had a message from her,

20 and we've called her. She is sick. She says she has the

21 flu and had been throwing up, and feels achy.

22 She said she could come in if she had to, but she

23 apparently doesn't feel good. Is that what she's --

24 THE CLERK: Right.

25 THE COURT: Did she say whether she has a fever

1 now, or temperature?

2 THE CLERK: No. She just has a cold and was

3 throwing up last night.

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4 THE COURT: She said it would take her about 45

5 minutes to get in. Do the parties have any thoughts?

6 MR. COUGHLIN: I think we should wait, Your

7 Honor.

8 MR. WEBER: I was going to suggest that I'd need a

9 minute or two to caucus with my colleagues, but I guess I

10 was going to suggest we go ahead and try to get done today.

11 MR. COUGHLIN: I'm not suggesting we don't try to

12 get done, but I think what -- I mean, these people put in

13 significant amount of time. I think we can wait an hour,

14 and I think that we should.

15 MR. WEBER: Are we going to bring someone in who

16 is vomiting?

17 MR. COUGHLIN: Well, I mean --

18 THE COURT: She's apparently not throwing up now.

19 MR. BERNICK: The question is whether she'll

20 really be able to focus on the evidence.

21 THE COURT: Does she have a fever now?

22 THE CLERK: She didn't say that she does.

23 THE COURT: Can you check with her and see if she

24 does have a fever?

25 THE CLERK: Yes.

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1 MR. COUGHLIN: I mean, I think she's in the health

2 care business or touches it somehow, so I think that she'd

3 be able to judge whether she can come in or not. If she's

4 too sick to come in and can't come in, I would say let's go

5 on, but if she says she can be here in an hour, we don't

6 know if it was food poisoning, or what.

7 THE COURT: Well, there's been quite a bit of flu

8 going around, having some personal experience with it.

9 MR. WEBER: A number of us have on that. In the

10 Minnesota case -- I don't need this on the record.

11 (Discussion off the record.)

12 THE COURT: We may go a little bit later today, in

13 any case.

14 MR. COUGHLIN: Your Honor, I don't know if she

15 knows that we have no trial tomorrow and the next day, and

16 if she could just make it through today she'd have four

17 days.

18 THE COURT: I think I've told them.

19 (Discussion off the record.)

20 THE CLERK: She doesn't have a fever.

21 THE COURT: Why don't you tell her we want her to

22 come in. She lives somewhere around the [DELETED] area, so

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23 it's probably half an hour, 40 minutes. So depending on how

24 quickly she gets on the road -- and then your order is who?

25 MR. WEBER: Viscusi, Scheffman, Wecker, and then

1 some trustee depositions.

2 THE COURT: Let me just go on the record. I've

3 reviewed the motions filed by the plaintiffs to exclude

4 certain testimony, and without having the actual transcripts

5 available as to each question, I would generally exclude

6 testimony as to the trustees' decisions to enter the lawsuit

7 or not enter the lawsuit. I would exclude that testimony.

8 I would also exclude testimony of the trustees as to

9 their opinions of the lawsuit generally.

10 As to Nicely, as to the testimony concerning the

11 warning labels, I think that's generally admissible.

12 I think the opinion testimony for the same reasons I

13 just indicated, or for the finding I just made, would not be

14 admissible.

15 I think the issue as to whether or not she was a

16 trustee at the time would go to the weight, but at least

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17 some of the period would have been covered, would have been

18 during the time when she was a trustee.

19 So I would generally exclude any of the opinion

20 testimony and generally exclude any of the internal

21 decision-making process of the trust funds as to how they

22 made the determination to join or not join the lawsuit.

23 MR. LERMAN: Your Honor, that would be opinion

24 testimony relating to a particular trustee's opinion of the

25 merits of the case, as well as what went into the

1 decision-making process to bring litigation?

2 THE COURT: Yes. I think the trust funds operated

3 themselves as a fund, and as such, I think the opinions of

4 individual trustees, whether they were in the minority in

5 making the decision or in the majority, is not relevant to

6 the case. And their general opinion as to the tobacco

7 companies, I think, is probably not admissible, as well,

8 under the requirement that the persons giving expert

9 testimony have some special training or experience to assist

10 the jurors in their determination.

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11 Did she say how long it would take her?

12 THE CLERK: 45 minutes. She should be here by

13 9:00.

14 THE COURT: Can you go back and explain to the

15 other jurors what the delay is?

16 (Recess taken.)

17 9:25 A.M.

18 (Proceedings in courtroom in the presence of the Jury.)

19 THE COURT: The jury will please be seated.

20 I will call upon the defendant to call your next

21 witness, and if you will take a seat. Your next witness

22 will be?

23 MR. BIERSTEKER: Kip Viscusi, Your Honor.

24 THE COURT: Would you swear the witness in?

25 (The Witness is Sworn)

1 THE COURT: If you will state your name for the

2 record, and spell your last name for the court reporter.

3 THE WITNESS: W. Kip Viscusi. V as in victory, I,

4 S as in Sam; C, U; S as in Sam, I. And W stands for

5 William.

6 THE COURT: If you will proceed.

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7 DIRECT EXAMINATION OF W. KIP VISCUSI

8 BY MR. BIERSTEKER:

9 Q. Thank you, Your Honor. Good morning, Professor

10 Viscusi.

11 A. Good morning.

12 MR. BIERSTEKER: Good morning, Ladies and

13 Gentlemen of the Jury. Permit me to reintroduce myself. I

14 am Peter Biersteker. I represent R.J. Reynolds Tobacco

15 Company.

16 Q. Dr. Viscusi, what is your profession?

17 A. I am an economist.

18 Q. Would you briefly describe your educational background

19 since high school for the jury?

20 A. I went to Harvard, where I got a bachelor's in

21 economics, a master's in public policy, a master's in

22 economics, and a Ph.D. in economics.

23 Q. And where are you employed now?

24 A. Harvard Law School.

25 Q. What is an economist doing at a law school?

1 A. Well, I am a professor there, and I direct their

2 program on empirical legal studies, which means using data

3 to analyze legal issues, and I teach statistical analysis,

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4 risk and environmental regulation, and judging scientific

5 evidence.

6 Q. How long have you taught at Harvard?

7 A. I've been there full time for three years, and I was a

8 visitor before that.

9 Q. Have you taught courses -- you've been a professor at

10 other universities besides Harvard?

11 A. I've been a professor at Duke University, Northwestern,

12 and visiting professor at University of Chicago.

13 Q. Have you spent any part of your career in public

14 service, working for the federal government?

15 A. Yes. From 1979 to 1980 I was deputy director of

16 President Carter's Council on Wage and Price Stability.

17 Q. Have you published any books in economics?

18 A. Yes, I have.

19 Q. Approximately how many, professor?

20 A. 16, and a couple more coming out this year.

21 Q. Have you published any articles on economics?

22 A. Yes, I have.

23 Q. Approximately how many?

24 A. 200.

25 Q. Have you ever served as a reviewer for peer reviewed

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1 publications?

2 A. Yes, for many journals.

3 Q. Have you held any editorial positions on economic

4 journals?

5 A. Yes, I have.

6 Q. I know the jury has heard about peer review. I'm not

7 sure they have heard what an editor is. Would you please

8 describe what an editor of a peer reviewed journal is and

9 how they relate to reviewers?

10 A. When people submit manuscripts to a journal it goes to

11 the editor. The editor selects the peer reviewers, and then

12 either by himself or in conjunction with the other editors

13 makes a decision as to whether to publish the paper.

14 Q. For what journals have you served as an editor?

15 A. The American Economic Review, Review of Economics and

16 Statistics, International Review of Law and Economics,

17 Geneva Papers on Risk and Insurance Theory, Journal of Risk

18 and Insurance, Journal of Regulatory Economics, Journal of

19 Environmental Economics and Policy; Regulation; Journal of

20 Risk and Uncertainty, of which I am the founding editor.

21 Managerial Decision Economics is another one.

22 Q. Is there a particular subfield within the discipline of

23 economics that is a particular interest of yours?

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24 A. My specialty is risk and uncertainty, and particularly

25 health and safety risks.

1 Q. And what do you mean by risk and uncertainty?

2 A. That there is some probability attached to an outcome

3 where mostly about how people take risks, job safety risks,

4 environmental risks, that affect their lives and how the

5 government regulates these risks.

6 Q. What is risk perception?

7 A. Risk perception is how people think about the risks, so

8 it is a measure of individuals' own subjective risk beliefs.

9 Q. How long has risk perception been an interest of yours?

10 A. I've been doing this, beginning with job safety risks,

11 since 1974, 1975.

12 Q. How do you assess how people perceive risks?

13 A. Well, there are two sources of information. First, you

14 can see how they behave; and second, you can design a survey

15 or use survey data that then asks them how they think about

16 the risk.

17 Q. How long have you been working with survey data?

18 A. I've been using survey data on risk perceptions since

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19 1974.

20 Q. Have you designed and utilized surveys in your own

21 research and publications?

22 A. Yes, beginning the early 1980s I've been running my own

23 surveys dealing with risk.

24 Q. Have you received funding from the federal government

25 in order to conduct surveys concerning risk perception?

1 A. Yes. Since 1984 I've been funded continuously by the

2 U.S. Environmental Protection Agency, for which I've been in

3 the field running surveys nonstop since 1984.

4 Q. Is risk analysis different from risk perception?

5 A. Risk analysis usually refers to how big the risk is,

6 whereas risk perception is how big people think it is. So

7 it deals with people's perception as opposed to measuring

8 risk.

9 Q. Have you studied and written about the actual and

10 perceived health risks of smoking?

11 A. Yes, I have.

12 Q. Have you published on that particular subject?

13 A. Yes, I have.

14 Q. If you would turn to what is marked in your

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binder as

15 Defense Exhibit AS 367, and describe for the jury what that

16 exhibit is.

17 A. This is the copy of my book, Smoking: Making the Risky

18 Decision. It was published by Oxford University Press in

19 1982.

20 Q. And is that one of your publications that deals with

21 the perceived and actual risks of smoking?

22 A. Yes, it is.

23 Q. Would you exhibit Exhibit AS 366, professor, and

24 describe to the jury what that publication is?

25 A. This is an article I've written called, Do Smokers

1 Underestimate Risks, published by the Journal of Political

2 Economy, which is published by the University of Chicago, in

3 1990.

4 Q. If you would turn to tab AS 363, professor, and

5 describe what that publication is.

6 A. This publication I also wrote, called Age Variations In

7 Risk Perceptions and Smoking Decisions, and it was published

8 by the Review of Economics and Statistics, which is

9 Harvard's journal.

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10 Q. Finally, if you would turn to tab AIW 3651, and

11 describe what that particular article is.

12 A. This is a paper called Constructive Cigarette

13 Regulation, published by Duke Law Journal last year.

14 Q. Now, did all four of these publications address the

15 issue of the perceived and actual risks of cigarette

16 smoking?

17 A. Yes, they did.

18 Q. Have you published other articles besides these four

19 that relate to that subject?

20 A. Yes.

21 Q. In these publications, did you rely upon survey data?

22 A. Yes, I did.

23 Q. What surveys did you rely upon in the publications

24 you've just described to the jury?

25 A. Four surveys: The first was a 1985 survey, the Audits

1 and Surveys survey, I'll call it. It is a national survey.

2 The second survey was 1991, which I undertook in North

3 Carolina. The third survey was 1997, also run by Audits and

4 Surveys Worldwide. And the fourth survey undertaken in 1998

5 that I did with Roper Starch, a survey firm.

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6 Q. What role, if any -- you said you did the North

7 Carolina and Roper Starch surveys. What was your role?

8 A. In the North Carolina survey I did entirely from start

9 to finish. I wrote the questions, and I had a graduate

10 student make the calls, and we did all the analysis.

11 In the 1998 Roper Starch survey I developed the

12 questions and worked with the -- directly with the survey

13 research firm in developing the questionnaire that we then

14 administered, and I analyzed the data.

15 Q. Did you have any role yourself with respect to the two

16 surveys, the 1985 and 1997 survey, by Audits and Surveys

17 Worldwide?

18 A. No, I had no direct role, although the 1997 survey

19 incorporated my 1991 questions into the 1985 survey, so it

20 was the amendment that included my analysis.

21 Q. What is Audits and Surveys Worldwide?

22 A. It is an international, respected survey research firm

23 based in New York.

24 Q. Where did you get the 1985 and 1997 Audits and Surveys

25 data?

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1 A. I got each of these sets of data from lawyers

2 representing the tobacco industry.

3 Q. And how did it happen that you got the survey data from

4 lawyers representing the tobacco industry?

5 A. Well, in 1997 I was working with them on related

6 cases. In 1985, shortly after that time, I had met with

7 them just to discuss what I knew about risk perceptions in

8 general, and during the course of this I was shown a stack

9 of materials that they had collected regarding risk

10 perceptions, and I went through it and I discovered that

11 they'd run this survey. It looked interesting, and I asked

12 for it.

13 Q. Did you analyze that data as part of any lawsuit for

14 which the survey may have been commissioned?

15 A. No.

16 Q. Did the lawyers give you the survey data?

17 A. Yes. I had to ask for it, and they had to get

18 approval, but then they gave me the data, yes.

19 Q. Were any conditions imposed upon your ability to use

20 the data?

21 A. No.

22 Q. Were you paid for any of the work that you did

23 analyzing the data for your publications?

24 A. Not for any of the publication-related work. I was

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25 paid for some analysis that I did, I would call a

1 verification of the original Audits and Surveys report.

2 Q. Did any tobacco company or tobacco company lawyer

3 exercise any editorial control over what you wrote about

4 these data?

5 A. No.

6 Q. For what particular risks of smoking did you compare

7 people's perception of the risks versus the actual risks?

8 A. I focused on three different risks. First, the lung

9 cancer risks associated with smoking; second, the total

10 mortality risk of smoking; and third, the life expectancy

11 loss associated with smoking.

12 Q. All right. Let's start with lung cancer. What is the

13 actual risk of death from lung cancer, and how did you

14 calculate it?

15 MR. WITHEY: Objection. Foundation.

16 THE COURT: Overruled.

17 A. I calculated two reference points, one for 1985 and one

18 for 1991 and thereafter, and they're fairly similar.

19 In each case I took the number of lung cancer deaths as

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20 estimated by the U.S. Surgeon General, just divided it by

21 the smoking population to determine the probability, and in

22 1985 it's 5 to 10 percent; 1991, 6 to 13 percent.

23 Q. In performing this calculation did you accept at face

24 value the data that you found in the Surgeon General's

25 report or did you critically evaluate it?

1 A. I accepted it at face value. I didn't alter the

2 Surgeon General's numbers at all.

3 Q. For what purpose did you calculate the actual risk that

4 a smoker faces of death from lung cancer?

5 A. So that when I had the answers to the questions of how

6 big the risk is that people perceived I could figure out did

7 they overperceive the risk or underperceive it, so I wanted

8 some reference point to figure out the risk perceptions were

9 too low or too high.

10 Q. What surveys did you examine to assess the public's

11 perception of the risk of lung cancer from smoking?

12 A. For lung cancer, I used all the four surveys that we

13 just mentioned. Where the 1985 survey pertains to whether

14 people think that smokers will get lung cancer,

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so does the

15 1997 survey; whereas the 1991 and 1998 surveys, the question

16 wording changes to whether people will die from lung cancer.

17 Q. Are there results of this comparison between the

18 perceived risks of getting or dying from lung cancer versus

19 the actual risk of mortality from lung cancer contained in

20 the publications that we just heard earlier in your

21 testimony?

22 A. Yes, they are, all the way through 1997. Those results

23 are --

24 Q. If you would turn, professor, to Demonstrative, DEM

25 6177. Is that a summary of your comparison of the perceived

1 and actual risks of lung cancer?

2 A. Yes, it is.

3 Q. Is it an accurate summary of the data you report in

4 your publications?

5 A. Yes.

6 Q. Will it assist the jury in understanding your

7 testimony?

8 A. Yes, it will.

9 THE COURT: Again, I think, Mr. Biersteker, you

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10 need to lead him through the findings before you put the

11 thing up.

12 MR. WITHEY: For the record, Your Honor, preserve

13 the objection we raised previously.

14 THE COURT: And I'll overrule the objection. But

15 in terms of the format, you would need to ask him his

16 opinions first before you put that up.

17 Q. Based upon your analysis of these data, did you reach

18 any conclusions within a reasonable degree of economic

19 certainty about the public's perception of the risk of lung

20 cancer versus the actual risk of lung cancer based on data

21 from the Surgeon General?

22 A. Yes. The punch line is that people overestimate the

23 risk of lung cancer, whereas the risk as of 1991 is 6 to 13

24 percent; the perception of the risk that I found was 43

25 percent in '85, 38 percent in '91, and 47 percent in my '97

1 survey.

2 MR. BIERSTEKER: Your Honor, may I?

3 THE COURT: Yes.

4 Q. All right. Professor, why don't you just explain this

5 chart to the jury, although we've talked about

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some of the

6 underlying results.

7 THE COURT: Not quite as animated as Fred

8 Flintstone.

9 MR. BIERSTEKER: Pardon me?

10 THE COURT: It is not quite as animated as Fred

11 Flintstone or Jim Cagney.

12 MR. BIERSTEKER: I do my best.

13 A. These are the true risk levels based on the analysis

14 that the Surgeon General had back then of 5 to 10 percent

15 back in '85, and 6 to 13 percent beginning in '91.

16 The 1985 survey, people thought that 43 out of 100

17 smokers would get lung cancer because they smoked.

18 In my smaller North Carolina survey in '91, people

19 thought 38 out of a hundred smokers would die from lung

20 cancer because they smoked.

21 And in my 1997 survey, people thought that 47 out of a

22 hundred smokers would get lung cancer because they smoked.

23 So all these perception numbers are way above the true

24 risk numbers.

25 Q. Thank you. Did you collect and look at data separately

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1 about how smokers perceive the risks as opposed to the

2 public generally?

3 A. Yes, I did, and for smokers it comes out a few

4 percentage points less, but in every case it's substantially

5 above the true risk.

6 Q. Did you calculate confidence intervals for the

7 percentages that are shown in this exhibit?

8 A. Yes, I did. In every case the -- none of the

9 confidence intervals include the true risk as part of the

10 confidence interval.

11 Q. Let me maybe take this a couple steps. Could you

12 explain to the Ladies and Gentlemen of the Jury what a

13 confidence level is, first of all?

14 A. Well, the standard confidence interval would be a 95

15 percent confidence interval. We don't know, this is just a

16 sample, so here we have, let's say, a couple thousand people

17 in the sample.

18 What we would like to ideally have is a measure of

19 everybody in the country's risk perception, but because of

20 data limitations and costs, we only get a couple thousand.

21 We're trying to figure out to what extent can we be

22 confident that the answers that we get from this couple

23 thousand people in the sample are indicative of the true

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24 value of risk perceptions across the entire population.

25 And what I've concluded is that there is a 95 percent

1 chance that the true value of people's risk perceptions out

2 there lies above the estimated scientific risk measure for

3 smoking.

4 Q. Why don't we turn to the next measure of the risk of

5 smoking that you examined, and that was the mortality risk.

6 Why don't you, just to be clear, explain to the Ladies and

7 Gentlemen of the Jury what you mean by mortality risk.

8 A. In the case of mortality risk, what I asked people was

9 out of 100 smokers, how many of them do you think will die

10 from lung cancer, heart disease, or throat cancer, or any

11 other smoking-related ailment because they smoke.

12 So I wanted to get not just lung cancer, but total

13 deaths due to smoking from all diseases. And that's what

14 these questions focus on.

15 Q. And just as you did with lung cancer, did you calculate

16 the actual risk that a smoker would die from one of the

17 smoking-related diseases?

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18 A. I did. And once again, this was using the U.S. Surgeon

19 General's number, taking that number at face value without

20 changing it in any way.

21 Q. And what did you calculate was the mortality risk from

22 a smoking-related disease?

23 A. My mortality risk ranges from 18 percent to 36 percent.

24 Q. What survey information did you use to analyze the

25 perceived risks of mortality from smoking?

1 A. Well, I didn't use the 1985 survey because that didn't

2 include a mortality risk question, but my '91 survey

3 included it, as did the '97 survey, and eventually we'll

4 talk about the '98 data, as well.

5 Q. Are the results of your comparison of the perceived

6 risks of mortality from smoking compared to the actual risks

7 contained in the publications that we discussed earlier in

8 your testimony?

9 A. Yes, they are.

10 Q. Professor, if you could turn to Demonstrative 6180.

11 A. I have it.

12 Q. Is that a summary chart of the comparison of the

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13 perceived and actual mortality risks of cigarette smoking?

14 A. Yes, it is.

15 Q. Is it accurate?

16 A. Yes.

17 Q. Will it assist the jury in understanding your

18 testimony?

19 A. Yes.

20 Q. Could you describe to the jury what you found in the

21 surveys from 1991 and 1997 about the public's perception of

22 the magnitude of the mortality risk of smoking compared to

23 the actual?

24 A. In each case, the public substantially overestimates

25 the mortality risk. Whereas the upper bound of the Surgeon

1 General's estimates is 36 percent, the public's perceptions

2 are 50 percent and 54 percent in the two years that I

3 analyzed.

4 Q. Have you reached an opinion within a reasonable degree

5 of economic certainty about the comparison between the

6 perceived and the actual risk of mortality from cigarette

7 smoking?

8 A. Yes, I have, and that is that people overestimate the

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9 mortality risk associated with smoking.

10 Q. All right. Let's put Demonstrative 6180 up, and if you

11 could explain this demonstrative to the jury, professor.

12 A. This is the actual risk based on the Surgeon General's

13 estimates, ranging from 18 to 36 percent. And the public's

14 perception of the mortality risk is that 54 out of a hundred

15 smokers would die, based on the North Carolina survey, or 50

16 out of a hundred smokers would die based on the 1997

17 survey.

18 Q. Once again, did these surveys permit you to examine the

19 perceived risk of mortality among only the people who

20 smoked?

21 A. Yes.

22 Q. And what were the perceptions of the people who smoked?

23 A. They were a few percentage points lower, but once

24 again, they were above the upper bounds of the Surgeon

25 General's estimates.

1 Q. Did you also calculate confidence intervals on the

2 estimates of the perceived risk of smoking that you found in

3 these surveys?

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4 A. Yes. And once again, and within 95 percent confidence

5 intervals, there is no chance that the Surgeon General's

6 estimates are going to lie within that range.

7 Q. So the lower bound of the confidence interval is still

8 above --

9 A. It's up there.

10 Q. -- above the blue box there?

11 A. That's right.

12 Q. Why don't we turn to the last measure of the risk of

13 smoking that you examined the actual and perceived risks

14 for, and that would be life expectancy or reduced life

15 expectancy. Please explain to the Ladies and Gentlemen of

16 the Jury what you mean by the risk of reduced life

17 expectancy.

18 A. Well, in addition to worrying about the probability of

19 death, I wanted to get a sense of how much life expectancy

20 people thought they could lose because of smoking.

21 So for example, for a woman who expects without smoking

22 to live to age 80, what would she think the life expectancy

23 of a smoker would be. So would it be 75? Would it be 79?

24 Would it be 60? So how would smoking affect your longevity.

25 And this is a way to get a handle on not only the

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1 probability of death, but on the amount of life lost, so we

2 can determine whether people are perceiving that amount

3 correctly, as well.

4 Q. Did you calculate the actual risk of reduced life

5 expectancy of the average smoker?

6 A. Yes, I did.

7 Q. How did you do that?

8 A. I took estimates, once again, from the Surgeon

9 General's reports on the amount of life you lose conditional

10 upon death from smoking, and I multiplied that amount by the

11 probability of death from smoking and calculated the life

12 expectancy loss from cigarettes.

13 Q. Did you again accept the data presented by the Surgeon

14 General at face value or did you critically evaluate it?

15 A. I took the Surgeon General's numbers at face value.

16 Q. What surveys did you use in this instance to compare

17 the perceived risk of loss of life, years of life, to what

18 you calculated was the actual?

19 A. I used my 1991 North Carolina survey, the 1997 national

20 survey. Eventually we can talk about the '98 data, as well.

21 Q. Were the results of the comparison regarding the risk

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22 of lost life expectancy contained in your publications that

23 we discussed earlier in your testimony?

24 A. Yes.

25 Q. What did you find, turning to Demonstrative 6183,

1 professor, was the actual risk of reduced life expectancy

2 for the average smoker?

3 A. What I found is that women assessed a greater loss of

4 life expectancy than did men, but in each case the assessed

5 life expectancy loss was above 7.2 years, which was the

6 upper bound of the Surgeon General-based estimates.

7 Q. Does Demonstrative 6183 summarize the results of the

8 comparison between the perceived risk of loss of years of

9 life to what the Surgeon General has estimated is the actual

10 loss?

11 A. Right. It summarizes the comparison I just made.

12 Q. Is it an accurate summary?

13 A. Yes, it is.

14 Q. Will it assist the jury in understanding your

15 testimony?

16 A. Yes.

17 Q. Have you reached an opinion within a

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reasonable degree

18 of economic certainty about the comparison between the

19 perceived risk of loss of life expectancy to the actual?

20 A. Yes.

21 Q. And what is that opinion?

22 A. That people overestimate the life expectancy loss

23 associated with smoking.

24 Q. Professor, I've placed demonstrative 6183 on the

25 monitor. Would you please explain this demonstrative to the

1 jury?

2 A. In the middle here is the assessed life expectancy loss

3 based on the Surgeon General, 3.6 to 7.2 years.

4 These are the results from my smaller North Carolina

5 survey. Men assessed that smokers would lose 8 and half

6 years of life, women 13.2 years.

7 In 1997, the male respondents say 10.1 years, female

8 respondents 14.8 years.

9 Q. And again, did you have the data with regard to

10 smokers' perceptions, and how did that compare to the

11 perceptions that are demonstrated in the exhibit?

12 A. The smokers, once again, are a bit less, but once

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13 again, smokers also overestimate the life expectancy loss.

14 Q. Professor, there is one survey that we really haven't

15 talked about yet, and that would be the 1998 Massachusetts

16 Roper Starch survey. Who paid for that survey?

17 A. That was paid for by the law firms representing the

18 tobacco industry.

19 Q. What was the purpose of conducting that survey?

20 A. The purpose was to get a handle on whether different

21 populations in Massachusetts, such as the Medicaid

22 population, and various worker groups, had the same kinds of

23 risk perceptions as were shown in the national survey.

24 Q. And were you able -- first of all, the 1998 survey --

25 if we did this already, I apologize -- that was a survey you

1 yourself conducted?

2 A. Yes.

3 Q. Were you able in examining that data to compare the

4 perceptions of the risks of smoking with respect to lung

5 cancer, total mortality, and life expectancy loss among

6 workers who were union workers versus workers who were not?

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7 A. Yes. One of the new additions I made to this survey

8 was adding a question, are you a union member or are you

9 covered by collective bargaining agreement, so that I was

10 able to break out the union workers.

11 Q. Professor, I don't think we need to put up the

12 demonstratives, but could you briefly describe to the jury

13 what you found when you compared the perceptions of the risk

14 of the union workers to the perception of the risks of the

15 nonunion workers?

16 A. There is no significant difference between the union

17 and nonunion worker responses. In fact, in some cases they

18 are identical, identical percentages.

19 Q. And so what did you find with respect to whether union

20 workers, what their perceptions of the risk of lung cancer

21 and total mortality and loss of life expectancy were

22 compared to what the actual risks were, based upon the

23 Surgeon General's data?

24 A. Union workers consistently overestimate the risk of

25 lung cancer, the total mortality risk, and the life

1 expectancy loss.

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2 Q. Professor, I'd like to put on the monitor a

3 demonstrative that was previously discussed in the testimony

4 of the plaintiffs' experts. That would be Plaintiffs'

5 Demonstrative 89. And I don't have a better copy of that.

6 Could you bring it up, 89, demonstrative? There we go.

7 Professor, this is an exhibit prepared by one of the

8 plaintiffs' experts who has already testified -- that's not

9 the right one. 89. You don't have it? Never mind. We'll

10 just go back to the elmo -- an exhibit prepared by one of

11 the plaintiffs' experts who has already testified. What

12 does this chart convey?

13 A. Well, the question is, "Most people who smoke all their

14 lives eventually die from an illness caused by smoking."

15 They're asking people whether they agree or disagree

16 with that statement. The statement itself is false, most

17 people don't die from smoking, yet over 80 percent of the

18 population agrees with it. And this includes smokers,

19 nonsmokers, adolescents and adults.

20 Q. Is this finding consistent or inconsistent with the

21 results of your own research?

22 A. It's consistent with my results, which indicate that

23 not only are people aware of the risks of smoking, but

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24 partly because of substantial publicity, they overestimate

25 the risks.

1 Q. Could you please turn to Exhibit AS 364 in your

2 binder.

3 A. Okay.

4 Q. What is that exhibit?

5 A. This is an article I wrote called Alarmist Decisions

6 With Divergent Risk Information, published in the Economic

7 Journal.

8 Q. And what year was that published?

9 A. 1997.

10 Q. Was the article peer reviewed?

11 A. Yes, it was.

12 Q. What divergent or conflicting information was the

13 subject of that particular article?

14 A. The focus of the paper is on when the chemical industry

15 and the government disagree about a risk, how do people

16 think about the risk.

17 Q. Who paid for that research?

18 A. The U.S. Environmental Protection Agency.

19 Q. What is your understanding of why the Environmental

20 Protection Agency was interested in this question?

21 MR. WITHEY: Foundation.

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22 THE COURT: Sustained.

23 Q. This article, you said, was published in the Economic

24 Journal?

25 A. Yes.

1 Q. Has this article been -- have you received any prizes

2 or recognition for this article?

3 A. Yes. I was just -- the Royal Economics Society gave me

4 their Article of the Year Award for this.

5 Q. Did you reach conclusions in this article about the

6 public perceptions of risk when they are faced with

7 conflicting or divergent information from different sources?

8 A. Yes, I did.

9 Q. And what were the conclusions that you reached in this

10 article regarding that?

11 A. Well, when there are two experts that disagree, let's

12 say one of them is from the government and the other is the

13 chemical industry group, one says the risk is high, one says

14 the risk is low, people place the greatest weight on the

15 worst case scenario. So when the experts are from two

16 different camps, it is the worst case scenario that

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17 dominates the risk perceptions. They go with the high end

18 risk estimates as opposed to simply averaging the estimates,

19 which is what I found if you had like two government

20 agencies disagreeing, people tend to average; or two

21 chemical industry experts disagreeing, people average; but

22 when it's two different experts from different groups, it's

23 the worst case scenario that people go with.

24 Q. Does it matter if the government says the risk is high

25 and the chemical industry said the risk was low, or if the

1 chemical industry said the risk was high and government said

2 the risk was low? Does it matter?

3 A. Surprisingly enough, it didn't matter, so that the

4 credibility is not necessarily whether it's the government

5 or the industry. It was the high end risk assessment that

6 drove people's responses.

7 MR. BIERSTEKER: All right. Thank you very much,

8 professor. I have no further questions.

9 THE COURT: Cross examination.

10 CROSS-EXAMINATION OF W. KIP VISCUSI

11 BY MR. WITHEY:

12 Q. Good morning, Professor Viscusi. Mike

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Withey.

13 A. Good morning, Mr. Withey.

14 Q. Nice to see you again. The question of how you began

15 to do some of this risk assessment work with respect to the

16 smoking question is one that Mr. Biersteker asked you. I

17 have a few follow-up questions, if you don't mind.

18 First of all, as I understand it, you met with the

19 attorneys for the tobacco industry, including Jones, Day,

20 about 13 or 14 years ago, in that range?

21 A. It was in the 1980s. I don't know exactly when. It

22 was after '85.

23 Q. And as I understand it, there is a woman attorney for

24 Jones, Day, Barbara Kacir, is that the person you had the

25 contact with?

1 A. Barbara Kacir in Cleveland, Ohio. Yes.

2 Q. And what you did for her and for the tobacco industry

3 attorneys was to reanalyze the 1985 Audits and Surveys; is

4 that correct?

5 A. In addition to discussing my work generally with them,

6 yes.

7 Q. Okay. But in other words, you had the Audits and

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8 Surveys survey from 1985 when you met with -- or you

9 received from the attorneys for the tobacco industry,

10 correct?

11 A. After I met with them, though that was not why I was

12 called in, but that was after I met with them.

13 Q. You wrote about a 30-page or so report on that

14 reanalysis, and it is included in your materials?

15 A. Yes, I did.

16 Q. And on direct exam, however, you indicated that Audits

17 and Surveys are who conducted this survey, and that they

18 were an independent agency, correct?

19 A. They are a private company.

20 Q. All right. But you didn't mention, however, that the

21 survey itself was funded by tobacco industry attorneys, did

22 you?

23 A. I don't think I was asked, but all these --

24 Q. You weren't asked. Who funded the Audits and Surveys,

25 the 1985 Audits and Surveys study that you cited in almost

1 every one of your charts? Who funded that?

2 A. That was funded by the law firms representing the

3 tobacco industry. I'm not sure which ones.

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4 Q. Jones, Day?

5 A. I know they were involved, but I don't know who wrote

6 the checks.

7 Q. Arnold & Porter?

8 A. They're a law -- yes. Shook, Hardy & Bacon. I'm not

9 sure which ones.

10 Q. Do you want me to show you -- never mind.

11 And then, as I understand it, you wrote your book,

12 what's the name of it, Smoking, A Risky Decision?

13 A. Making the Risky Decision.

14 Q. And a draft of the book before it was published was

15 sent to, again, Jones, Day, correct, Barbara Kacir?

16 A. I sent it to her as a courtesy at the same time I

17 mailed it off to Oxford University Press.

18 Q. Okay. And she wrote you back saying, it looks fine?

19 A. I think she did. I don't remember.

20 Q. And as I understand it then, the 1990 -- was it the

21 1998 Roper survey then that was funded by the tobacco

22 industry, as well?

23 A. As well as the '97 survey. Both of them.

24 Q. Okay. So the two Audit and Surveys surveys and the

25 1998 Roper survey were all funded by the tobacco industry

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1 through their lawyers, correct?

2 A. Oh, yes, they were.

3 Q. In fact, that one, that particular survey was to be

4 used in the Massachusetts case, correct?

5 A. That's correct.

6 Q. And you've also done some other consulting work for the

7 tobacco industry; isn't that a fact?

8 A. Yes, I have.

9 Q. In fact, you worked with R.J. Reynolds to develop

10 warnings on the hazards of cigarettes, the Premier

11 cigarette, correct?

12 A. I spent a morning with them advising them on the

13 warning of the fire hazard created by the cigarette. The

14 carbon tip could fall off and start a fire. One of my areas

15 of expertise is hazard warnings, so I advised them on the

16 fire warning. That's correct.

17 Q. But they did not ask you to design a warning in how to

18 communicate the risks, the health risks of smoking, they

19 didn't ask you that, did they?

20 A. The Surgeon General --

21 MR. BIERSTEKER: I'm going to object.

22 THE COURT: Sustained.

23 Q. You testified on behalf of the tobacco industry in

24 public hearings regarding the FDA and OSHA jurisdiction,

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25 correct?

1 A. Yes.

2 Q. And that was on behalf of Covington and Burling, again,

3 a law firm for the tobacco industry?

4 A. That's correct.

5 Q. And that was in what, 1997?

6 A. I don't know. I think it was before '96.

7 Q. Okay. You were also consultant with the tobacco

8 industry attorneys on the Joe Camel case, is that correct,

9 for RJR?

10 A. Yes, I did.

11 Q. In fact, in your many areas of endeavor you've also

12 calculated the private loss to smokers in not being able to

13 smoke in certain nonsmoking areas, and you've calculated

14 that at approximately 11 billion dollars a year, correct?

15 A. That was at the request of the chief economist for the

16 Secretary of Labor. Yes, I did that. Yes.

17 Q. It is your judgment then that the private loss to

18 smokers not being able to smoke in public places is 11

19 billion dollars per year, correct?

20 A. I don't remember the number, but if we were to ban all

21 smoking by smokers at work and in public places,

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if you

22 looked in their consumer surveys, how much they value

23 smoking cigarettes would be that number.

24 Q. And you've been listed as an expert witness in six or

25 seven attorney general cases and numerous individual smoking

1 cases for the tobacco industry; is that correct?

2 A. I don't think I have done individual smoker cases.

3 Q. Six or seven attorney general cases you're listed as an

4 expert, or had, correct?

5 A. Yes.

6 Q. And I assume then you're not offering yourself as an

7 expert in adolescent psychology, correct?

8 A. I'm not a psychologist.

9 Q. Or an addiction specialist, or what kinds of things go

10 through people's mind that are addicted; you're not an

11 expert in that field, correct?

12 A. That's correct.

13 Q. Now, let me direct your attention to a couple of these

14 surveys that you've presented the data from. First of all,

15 I'm going to try to go in chronological order. I think it's

16 easier to understand.

17 1985 then was the Audits and Surveys survey

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that again

18 was funded by the tobacco industry lawyers. That's the

19 first one, correct?

20 A. Yes.

21 Q. And you have not, of course, done any work that looks

22 at the issue of the -- you've not done any surveys, for

23 instance, in the 1950s, '60s, '70s, until the mid-'80s,

24 correct?

25 A. That's correct.

1 Q. And in your reanalysis, which I assume you're familiar

2 with -- we have a copy if you need to look at it -- this

3 reanalysis that you performed for Jones, Day has some

4 language in it that I want to see if you could agree with.

5 You present a lot of the tables from this reanalysis in

6 the three or four other publications, correct, including

7 your book?

8 A. I don't know which tables changed, which ones were

9 redone.

10 Q. Well, part of your testimony today is based on this

11 1985 Audits and Surveys work, correct?

12 A. Right, that's correct.

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13 Q. But some of the tables from the reanalysis that you did

14 found its way into your books and your publications; fair

15 enough?

16 A. They may. I don't know which tables changed, which

17 tables didn't.

18 Q. We're going to point out a couple. Isn't it true that

19 in one of the tables in your reanalysis, and let me -- I'll

20 show it to you if you need me --

21 A. I haven't seen it since 1980, so I don't have a copy.

22 Q. Well, it was marked as an exhibit to your deposition,

23 was it not? Exhibit 6 to your deposition?

24 MR. WITHEY: Your Honor, may I approach?

25 THE COURT: Why don't you -- can you put it on the

1 elmo?

2 MR. WITHEY: All right.

3 THE COURT: You can look if you need to.

4 Q. Can I just go to the elmo? I'm sorry, that's pretty

5 dark.

6 Anyway, you did not, in fact, cite this, Dr. Viscusi,

7 you did not cite this in your reliance materials; is that

8 correct?

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9 A. I don't think I did.

10 Q. All right. And in fact, you didn't -- and you didn't

11 bring it to your deposition, correct?

12 A. I don't think I have a copy of it. I think it came out

13 of the documents from the Minnesota case.

14 Q. Okay. At any rate, we marked it as Exhibit 6 to your

15 deposition that we held there in Boston on December 14th.

16 Okay?

17 A. Okay.

18 Q. Now, I wonder if we could turn to -- one of the tables

19 that you utilized in that report is Table 8 on page 25. Do

20 you see this?

21 A. Not very well, but I do see something.

22 Q. You've got that right. Risk perception based on

23 information acquired and the attitudes toward cigarettes.

24 Do you see that, sir?

25 A. Yes.

1 Q. And you present a significant amount of data again from

2 the 1985 Audits and Surveys, correct?

3 A. That's correct.

4 Q. And then you note some limitations. On the last page I

5 want you to read along with me, if you could.

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These are

6 your words, I think. Do you mind reading that to the jury,

7 what you said about this table?

8 A. Well, "Let me emphasize that there are a total of 192

9 categories here" -- let me just explain to the jury what the

10 categories are, which are the open-ended responses people

11 have regarding cigarettes.

12 Q. Thank you.

13 A. --"so that in terms of statistical significance, any

14 standard errors on the fractions listed are quite large. My

15 inclination would not be to use this table again in any

16 document that I would circulate outside of this small group

17 of individuals reading my report at this time, since the

18 groupings involve such a small number of individuals in any

19 particular category that the statistical reliability of the

20 results at this refined a level is not great."

21 Q. Now, by the small group of individuals, you are

22 referring to the lawyers that you were giving this report

23 to?

24 A. Whoever is -- well, the small -- the small group of

25 individuals or the small group of readers. What I'm saying

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1 is reliability of the results should not be circulated

2 beyond a big audience because they are not statistically

3 significant.

4 Q. Well, the question I had though was who did you give

5 this reanalysis or paper to?

6 A. This is a report to Barbara Kacir.

7 Q. At Jones, Day?

8 A. Yes.

9 Q. Now, we have a copy of your book somewhere -- I have

10 it -- Smoking: Making a Risky Decision.

11 A. Yes.

12 Q. A nice picture of you here on the cover.

13 A. That's not me. That's Max Beckmann.

14 Q. I'm sorry. I was so tired I didn't notice.

15 Is the Table 8 from your book on -- excuse me -- the

16 Table 8 from your book -- excuse me -- table 5.2 in your

17 book the same as Table 8 from your reanalysis?

18 A. It's some of the numbers could have changed, but it's

19 basically the same thing.

20 Q. So you did present the data from the Audits and Surveys

21 that you put in your reanalysis that you gave to the

22 lawyers, you put that in your book, correct?

23 A. Along with the standard errors, so a professional

24 audience could figure out what matters and what doesn't,

25 whereas lawyers reading this who don't know

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anything about

1 statistics might not. That's why I did this.

2 Q. So you're saying that you had the confidence intervals

3 in --

4 A. I'm saying.

5 Q. -- in the table. Where are the confidence tables in

6 5.2?

7 A. Below each number is the standard error of the

8 estimate.

9 Q. So then --

10 A. You just have to construct confidence interval.

11 Q. But you had not constructed the confidence intervals

12 back in 1985 when you wrote this report, had you?

13 A. Let's see the table.

14 Q. I'm just asking you whether you had constructed

15 confidence intervals back in 1985.

16 A. I think the standard errors are in that table, as well,

17 but if lawyers are reading it who don't know how to

18 interpret them, then I didn't want them to get too carried

19 away with the point estimates.

20 Q. Would you agree with the statement that in terms of

21 statistical significance, any standard errors on

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the

22 fractions listed are quite large?

23 A. Yes.

24 Q. All right. Now, I understand you put reference to this

25 same 1985 survey on a Duke Law Review article, correct? AS

1 351.

2 A. I assume I quote from that in that article, as well.

3 Yes.

4 Q. Did you mention that the tobacco industry provided

5 financial support for the Audits and Surveys, for yourself?

6 A. No, I don't think I did.

7 Q. You made a presentation in Switzerland last year in

8 April of 1998. Do you recall that?

9 A. Yes.

10 Q. And it doesn't mention the tobacco industry financial

11 support either for the Audits and Surveys or for yourself,

12 correct?

13 A. That's correct.

14 Q. Weren't there 108 people in the Audits and Surveys

15 survey itself that were rejected or cut, the results were

16 cut out of the survey?

17 A. There were some miscodings that the survey firm cleaned

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18 up.

19 Q. You did not know why that coding -- excuse me -- you

20 did not know why the people conducting the Audits and

21 Surveys either rejected or cut the people's results; is that

22 correct?

23 A. The 1985 one? No.

24 Q. Yes?

25 A. No.

1 Q. So that is correct?

2 A. That is correct.

3 Q. Let me ask you if you agree with these statements from

4 AS 363, and this is reflecting the Audits and Surveys of

5 1985 from page 579, if you want to turn to it, professor:

6 Although lung cancer represents an important risk of

7 smoking, the wording of the risk perception question is not

8 ideal.

9 Do you see that, sir?

10 A. No, but I remember the phrase.

11 Q. In other words, you're talking about the wording of the

12 risk perception question in the 1985 Audits and Surveys

13 survey, correct?

14 A. Do you want me to explain what was meant by

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that?

15 Yes. That is what I was talking about, yes.

16 Q. Let me read you another quote that you gave on page

17 580. Why don't you read -- I'll read it. Quote, "A

18 potentially more important omission is that adverse health

19 effects other than lung cancer were not included in the

20 survey."

21 A. I agree.

22 Q. And again, you were talking at that time about an

23 omission from the 1985 Audits and Surveys, correct?

24 A. Mine had only dealt with lung cancer.

25 Q. All right. Now, in none of your charts that I saw at

1 least, and correct me if I am wrong, that were presented to

2 this jury did you have a breakdown of between adolescents

3 and adults?

4 A. That's correct.

5 Q. What you're talking about in that survey was

6 adults -- excuse me -- what you talked about to the jury in

7 the charts was adults risk perception, correct?

8 A. Well, the '85 survey starts with age 16, and the 16 to

9 22 year old, that group actually perceives a greater risk of

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10 lung cancer than the older groups.

11 The subsequent surveys, the age level starts at 18

12 because we changed our societal smoking age range.

13 Q. I just asked the question, the question I asked was

14 whether the data that you presented in the charts for the

15 jury was data that pertained to adults.

16 A. Well, I'm not sure what you call a 16 year old, but it

17 starts with 16, one year, and starts with 18, and the rest.

18 Q. The only age category that had people that went down to

19 16 was the 1985 Audits and Surveys, correct?

20 A. That's what I just said, yes.

21 Q. And in fact, the category included age 16 to what, 22?

22 A. I believe that was the range.

23 Q. And you, on the other hand, don't have the data to

24 determine how many of those people in that category were 16

25 or 17 as opposed to those who were 18, 19, 20, 21, and 22.

1 Isn't that a fact?

2 A. No. We only asked the people the age range they were

3 in.

4 Q. In other words, you don't know how many 16 and 17 year

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5 olds were within that age category?

6 A. That's correct.

7 Q. Yet in some of your publications is it true that you

8 present tables and charts not presented to this jury that

9 refer to teenagers or teens?

10 A. I may call them that group. I gave them a variable

11 label.

12 Q. When you did your North Carolina survey -- I'm moving

13 now to 1991 -- you actually did the phone calling yourself;

14 is that right?

15 A. No, I didn't do any phone calling myself.

16 Q. A graduate student?

17 A. Right.

18 Q. You did not hire a private independent survey firm to

19 conduct this survey, correct?

20 A. I didn't have any money to do that, so I did this

21 myself. This is a self-financed study, yes.

22 Q. Okay. And you agree, in fact, you've put in your

23 documents, that this North Carolina survey is not nationally

24 representative, correct?

25 A. I agree.

1 Q. So when you told the jury on direct examination that

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2 the results of the survey were done in a way that were

3 nationally represented, you didn't mean to say that as to

4 the 1991 survey, did you?

5 A. I don't recall saying that, but the nationally

6 representative ones were '85 and '97.

7 Q. Well, I recall the words, and I wrote it down, that

8 these were true values across the country. Again, just to

9 make sure for the jury, you didn't mean the 1991 survey

10 represented true values for across the country, did you?

11 A. No. These were the values in North Carolina.

12 Q. And part of the idea of this 1991 survey, as I

13 understand it, was to kind of corroborate what happened in

14 the '85 survey, correct? Something that you would do to

15 corroborate the results of '85?

16 A. Well, it is a sensitivity test. I ran maybe four or

17 five different versions of the questions to see if this was

18 the most natural way to ask the question. After doing that

19 detailed test, the responses people tended to think of were

20 percentage terms when they answered the question, so that I

21 went with that general approach, but I changed it to get a

22 mortality. So I added some things that weren't in the

23 earlier survey.

24 Q. And as to those four or five -- by the way,

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you've

25 never taken a class in survey design, correct?

1 A. It comes up in statistics classes, but I've never taken

2 a full course called survey design.

3 Q. And, of course, it is important if you're going to be

4 testing various questions to have accurate encodation and

5 recollection of what the answers were from the people

6 answering the questions; fair enough?

7 A. You'd want to have accurate records, yes.

8 Q. And you'd want to be able to retain that data in order

9 to be able to verify the accuracy of that; fair enough?

10 A. As long as I'm analyzing it, yes.

11 Q. In fact, one of the standards in doing this is retain

12 the raw data so that you can go back and make sure that if

13 you wanted to look at any other aspect you'd be able to do

14 that; fair enough?

15 A. I don't maintain coding sheets for life. I mean, how

16 long are you talking about?

17 Q. Well, let's see. Long enough -- let me ask you this.

18 Did you have an understanding in 1991, maybe, just maybe,

19 the tobacco industry might be interested in what your

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20 results were?

21 A. No. They didn't fund the study, they had nothing to do

22 with it.

23 Q. Well, isn't it true that you took -- excuse me -- you,

24 the graduate students working for you, took down the results

25 of the questions that were asked these 200 people?

1 A. That's correct. We have written coding sheets.

2 Q. And in fact, you've lost 160 of the 200 coding sheets;

3 isn't that a fact, professor?

4 A. I don't think I've lost them, I've moved twice since

5 then, I think I've tossed them.

6 The coding sheets people have are not for the survey

7 itself, but some of the pretests.

8 Q. You had 40 of them out of 200 though, right?

9 A. There was 40 coding sheets, but not necessarily for the

10 survey. These were pretext questions.

11 Q. 1997, again, Audits and Surveys funded by the tobacco

12 industry, correct?

13 A. That's correct.

14 Q. 1998, you understood at least that these two, '97, '98,

15 could be used for litigation for the tobacco

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industry,

16 correct?

17 A. I expected them to be used for litigation.

18 Q. Let me ask you some questions about it, because

19 certainly in 1997 and 1998 there had been a lot of

20 information that came out fairly recently about the tobacco

21 industry about the issue of addiction and manipulation of

22 addiction in the public media. Fair enough?

23 A. Yes.

24 Q. And you agree that you want the risk perceptions to

25 reflect the state of information at the time of the survey;

1 fair enough?

2 A. I want the state of information to be used to judge

3 risk perceptions.

4 Q. At the time of the survey?

5 A. That's correct.

6 Q. And knowledge was certainly not the same in the 1950s

7 as it was in 1997 or 1991; fair enough?

8 A. Our knowledge has improved, yes.

9 Q. In fact, you testified, you agree you don't know what

10 the state of the public knowledge is on this question in

11 1953, 1954, for instance?

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12 A. Except as a four year old at that time, and also kept

13 tabs on Reader's Digest articles, but apart from that, I

14 don't know everything about what was known at that time.

15 Q. And the kind of information that's come forward prior

16 to these 1978 -- excuse me -- 1997 and 1998 surveys that you

17 described to the jury includes information that came from

18 the internal files of the tobacco industry that's been

19 published in the newspapers as a result of the Bliley

20 committee, and the disclosure of documents that have come in

21 the last couple of years?

22 A. Well, I'm not sure how much of that was new news, but

23 yes, there has been disclosure of documents.

24 Q. There's been massive publicity in the last couple of

25 years, has there not, about the tobacco industry? Fair

1 enough?

2 A. Yes. I'm not sure how much of this is hard news,

3 scientific news, is what I'm saying.

4 Q. You recall there was a release of documents that was

5 published in The Cigarette Papers. Do you know about that?

6 A. Yes, and during the Minnesota trial a lot

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of things

7 went on the web, but I didn't see a lot of news stories

8 covering so much the science as the release of the

9 documents.

10 Q. I'm not going to go through it, the jury has already

11 seen some of the articles, but you understand that the

12 question of manipulation of addiction has come out recently?

13 MR. BIERSTEKER: Objection, Your Honor. This is

14 well beyond the scope.

15 THE COURT: Overruled.

16 A. I know there have been discussions of that in the

17 media, yes.

18 Q. Let me ask you this: Did you try to make an attempt to

19 determine what was the information available to consumers,

20 including the people that might be in your surveys, in 1997

21 and '98 and compare them to the information that was

22 available to people back in the 1950s, '60s or '70s?

23 A. Well, I don't know what people had back then, so I

24 don't see how I could do a comparison.

25 Q. Well, you agree with the basic point that information

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1 transfer can affect risk perceptions and beliefs?

2 A. If it's new information provided in a convincing

3 manner, yes.

4 Q. Would you also agree that people with low risk

5 perceptions are more likely to smoke?

6 A. Yes.

7 Q. And you agree, smoking hazards are not immediate; in

8 other words, that the hazards are not immediate, it's not

9 like burning or not like broken bones, and so therefore the

10 outcome of disease is not as apparent as some other

11 hazards?

12 A. Some may be immediate, but certainly the more

13 consequential outcomes are not immediate.

14 Q. I'm going to talk to you a little bit more about the

15 issue of information transfer. You certainly agree with the

16 proposition, information matters as in terms of risk

17 perception, correct?

18 A. It does, if it's new information that people don't

19 already have.

20 Q. First I want to go back into some of the studies and

21 the results. Now, you've used the what you claim is the

22 Surgeon General's statements of what the absolute risk of

23 dying from lung cancer or from other diseases related to

24 smoking are. Is that correct?

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25 A. Yes.

1 Q. And you have not -- you understand that Chapter 3 of

2 the Surgeon General's report contains relative risks of

3 smoking; in other words, comparing smokers to nonsmokers,

4 how much more lung cancer the smokers get, for instance,

5 than nonsmokers, correct?

6 A. That's correct.

7 Q. And is it your testimony that the values that you've

8 put up before the jury here are actually contained in the

9 Surgeon General's report as opposed to those which you've

10 calculated based upon the Surgeon General's report?

11 A. All of my numbers use Surgeon General numbers for the

12 numerator, and I put the number of smokers in the

13 denominator.

14 Q. In other words, the Surgeon General itself does not

15 display the numbers that you put, it does not say here is

16 the absolute risk of lung cancer and smoking, does it? You

17 had to make the calculation?

18 A. I did.

19 Q. And in fact, the Surgeon General in Chapter 3 eschewed

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20 the idea of using the absolute risk as a marker of cigarette

21 hazards, correct?

22 A. I don't recall that.

23 Q. Well, if I showed you Chapter 3 or any chapter, you

24 would only see the relative risk here as opposed to here is

25 a chart showing the absolute risk of lung cancer, mortality,

1 et cetera; fair enough?

2 A. Yes.

3 Q. Let me talk to you a little bit about those risks.

4 First of all, you agree with the proposition that lung

5 cancer risk perception in survey questions serve as a proxy

6 for smoking risk more generally, correct?

7 A. Yes, I believe you could be picking up more general

8 attitudes towards smoking risks.

9 Q. And the point is then, therefore, if you ask people

10 about lung cancer risks as you do in your questions, in your

11 surveys, that question could serve in the minds of the

12 answerer, respondent, as a proxy for smoking risks more

13 generally, including risk of dying from other causes; fair

14 enough?

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15 A. It could, yes.

16 Q. In fact, you noted that in your book on page 142?

17 A. That's a hypothesis. We don't know it's true, but it's

18 possible. That's why I said it could.

19 Q. Well, let me read it to you and see if you have the

20 word "could" in there, just to be precise.

21 A. Sure.

22 Q. You're talking about the result that risk of lung

23 cancer posed by cigarettes dwarfs, in your words, the actual

24 estimate of the risk. If you want to turn to 142 --

25 A. Page number?

1 Q. And the next sentence reads, this is on the third

2 paragraph -- here, let me just put it up here. You talk

3 about the perception of lung cancer risk from smoking

4 dwarfing scientific evidence of actual risk levels. Do you

5 see that? Right here.

6 A. Where?

7 Q. Right here.

8 A. Okay.

9 Q. That is your basic point that you've come here to

10 testify about, correct?

11 A. Right.

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12 Q. Then you say, "This result occurs in part because lung

13 cancer risk perception survey questions serve as a proxy for

14 smoking risks more generally." Did I read that correctly?

15 A. Yes.

16 Q. You don't say it might occur or it could occur, you say

17 it occurs. Is that the language you used?

18 A. That's what I used.

19 Q. Thank you. So let's take the assumption, if we could,

20 for sake of discussion that when people hear the word lung

21 cancer they're using that as a proxy for more general risk

22 of dying from smoking, okay? That notion, okay? You follow

23 me?

24 A. Yeah. That's -- (pause)

25 Q. The risk, as I understand it, the risk of dying from

1 smoking cigarettes that you have calculated, based upon the

2 Surgeon General, is between 18 and 36 percent?

3 A. That's correct.

4 Q. Okay. But you're familiar, are you not, under 4787,

5 with the study done by Mr. -- or Dr. Borland, Ron Borland at

6 the Center for Behavioral Research and Cancer --

7 A. No, I'm not.

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8 Q. Let me put this up, and I'll ask you to comment on it.

9 "What do people's estimates of smoking-related risk mean?"

10 Okay. And in this document -- do we have this on the --

11 MR. BIERSTEKER: I object. There is no foundation

12 for examining this witness about this. There's been no

13 testimony that it's authoritative. In fact, he said he

14 doesn't know the article.

15 THE COURT: You can ask him whether he agrees or

16 disagrees. It's not being offered for the truth, it's only

17 being offered to test his opinion.

18 Q. In determining whether the 18 to 36 percent figure that

19 you've given to the jury was accurate, did you survey other

20 aspects of the literature to determine what people were

21 saying about it?

22 A. Yes.

23 Q. All right. And isn't it true that the recent work of

24 Doll -- this is Sir Richard Doll. Are you familiar with

25 that?

1 A. I've even read their study.

2 Q. In fact, he was knighted by the Queen of England

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3 because of his work linking smoking to lung cancer, was he

4 not?

5 A. That was probably part of it.

6 Q. Under this study, the work of Doll and Peto and their

7 colleagues showed that for continuing lifetime smokers, the

8 risk was about one in two, correct?

9 A. This is for British doctors in a country that has the

10 highest lung cancer risks in the world, so this is not for

11 the American population.

12 Q. American doctors don't die as much as British doctors

13 do --

14 A. Right.

15 Q. -- if they smoke cigarettes?

16 A. The British doctors in the survey, 20 percent of them

17 are alcoholics, they drink 42 drinks per week, so this is

18 reported in their article.

19 They also report in the article that Britain has the

20 highest rates of lung cancer in the world, so that may not

21 be representative of other countries such as the United

22 States. This is all on page 1 of their paper.

23 Q. Okay. But you agree with the proposition that what

24 they're talking about is the smoking attributable fraction

25 of the relative risk of smoking versus nonsmoking?

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Source: https://www.industrydocuments.ucsf.edu/docs/hjhd0001

1 A. Right.

2 Q. That's what they talked about, correct?

3 A. But their analysis does not control for other personal

4 characteristics. I have read the paper. It only tests

5 smokers versus nonsmokers, that the risks of smoking are

6 compounded if you're an alcoholic.

7 Q. Let me ask you this. If you were to assume that the

8 perceived -- with the perception of the question, the

9 person's question was, well, lung cancer, that means all

10 risks, and they say -- they come out with your numbers, 43

11 percent, correct, and the true risk is as high as 36

12 percent, or if you agree with this particular quote 50

13 percent, then there wouldn't be much difference, would

14 there, between the perceived risk and the actual risk?

15 Isn't that a fact?

16 A. If true risk is 50 percent, people are right on target.

17 Q. Let me ask you if you've cited in any of your work the

18 concept of optimism bias.

19 A. No, I have not cited that.

20 Q. You're not when you ask these questions asking, "What

21 is your risk if you smoke, what is your perceived risk,"

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22 correct?

23 A. I didn't think that was a natural way to ask the

24 question.

25 Q. You asked, if a hundred smokers, lifetime smokers, of a

1 hundred lifetime smokers, how many would die of lung cancer,

2 that's your question, right?

3 A. I use a denominator of a population, because that's

4 what I've done for EPA.

5 Q. And there is certainly a large amount of literature

6 that examines the question of what's called optimism bias,

7 which the jury heard from Dr. Jeffrey Arnett. You're

8 familiar with that concept at least, are you not?

9 A. Right. In fact, I've even tested it in one of my

10 books.

11 Q. You've read Paul Slovic's work, Do Adolescent Smokers

12 Know The Risks, have you not?

13 A. Yes, I have.

14 Q. And you're familiar with the criticisms that Dr. Slovic

15 had of your analysis, correct?

16 A. And I'm publishing a critique of that in the Journal of

17 Behavioral Decision Making.

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18 Q. A critique of a critique?

19 A. I'm publishing a critique of his paper. This is a

20 paper he wrote twice.

21 Q. This is -- the article has been marked as Exhibit

22 4801. If we could turn to page 1135.

23 In this article we can bring up the quoted portion,

24 please. There are four failings that he notes in your

25 analysis. One is, the first is the faulty assumption that

1 one knows the risk of an activity if one knows the

2 probability of an adverse outcome of that activity, even if

3 one does not fully comprehend the severity of such an

4 outcome.

5 Do you see that point?

6 A. I see it.

7 Q. And he's looked at it in terms of adolescents,

8 something you haven't testified to.

9 Can we go to the next page?

10 "I have seen no evidence to show that young people

11 have realistic knowledge of what it is like to experience

12 lung cancer, chronic obstructive pulmonary disease, or any

13 of the other fates awaiting smokers that many

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would consider

14 worse than death."

15 Do you recall this quote from Dr. Slovic?

16 A. I do.

17 Q. And you yourself have not analyzed from a

18 psychologist's standpoint of adolescents what their

19 perceptions of it is to say dying of lung cancer,

20 obstructive pulmonary disease, or emphysema. You've not

21 examined that question, correct?

22 A. Neither did he, so he didn't do that either as part of

23 his paper.

24 Q. But you didn't do it?

25 A. No. I have not looked below age 16.

1 Q. Wait a minute. I thought your 1991 survey was above

2 age 18.

3 A. Well, saying I started above age 18 in some surveys is

4 consistent with saying I've never looked below age 16. I've

5 looked at age 16.

6 Q. We've already been through that. Let me just hold on

7 to this concept for a second on the risk perception.

8 You asked the question, as I understand it, what was

9 the lifetime risk to a smoker, and asked them to quantify it

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10 between for a hundred people between 0 and 100, correct?

11 A. That is correct.

12 Q. Now, based on your background and training, do you

13 think people, say, make the decision "I'm going to become a

14 lifetime smoker," or are they going to say "I'm going to try

15 a cigarette" when they first start smoking?

16 A. Most initial smoking is just a single cigarette. It's

17 not, you know, a lot of cigarettes.

18 Q. And you're familiar with the idea that people think

19 they're going to be able to stop smoking, correct?

20 A. Some people think they can quit.

21 Q. We're going to put a chart up. Certainly the risk of

22 smoking a carton of cigarettes is a lot less than the risk

23 that you've put up of dying from cancer, correct?

24 A. Yes.

25 Q. In fact, if the perception of someone buying their

1 first cigarettes or deciding to start to smoke is "I can

2 stop in a year," their risk perception is, "Well, if I stop

3 in a year I probably have very little chance of dying of

4 lung cancer." Fair enough?

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Source: https://www.industrydocuments.ucsf.edu/docs/hjhd0001

5 A. I'm not sure what very little means, but it would be a

6 year of smoking.

7 Q. What's the risk, for instance, of dying of lung cancer

8 from a carton of cigarettes?

9 A. I could calculate it, but it is low.

10 Q. In infinitesimally small, I think you said, correct?

11 A. I don't remember if I've said that.

12 Q. But what you did is in your survey, what you compared

13 was the actual perception, you compared the actual

14 perception of a lifetime smoker and then put up the risks of

15 lifetime smoking, correct?

16 A. Yes.

17 Q. But the actual choice that people make is rarely "I'm

18 going to become a smoker for life." Would you agree to

19 that?

20 A. Well, people who choose not to quit, in fact, make that

21 choice.

22 Q. Let me go to the next part about optimism bias, if we

23 could. If we could bring up the Slovic article, 4801.

24 Let's go to page 1137, the quote.

25 What Dr. Slovic found out again -- this is looking at

http://legacy.library.ucsf.edu/tid/lmc05a00/pdf
Source: https://www.industrydocuments.ucsf.edu/docs/hjhd0001

1 adolescents, which again you haven't presented -- young

2 smokers are highly likely to see themselves as less at risk

3 from cigarettes than the hundred hypothetical smokers asked

4 about in the survey questionnaire.

5 Do you see that?

6 A. This is a conjecture on his part.

7 Q. Let's look at the literature then, okay? Could you put

8 the next exhibit -- this is a work by Dr. Weinstein --

9 A. No, that is Dr. Slovic.

10 Q. Go ahead, let's go back to that one.

11 Dr. Slovic presents a table done in the survey that he

12 did in Oregon, correct?

13 A. That's right.

14 Q. And this -- go ahead, please -- "This survey just looks

15 generally at how little or much risk there is of smoking.

16 Every single cigarette smoking causes a little bit of harm."

17 Do you see that.

18 And the difference between light smokers and heavy

19 smokers, right?

20 A. Right.

21 Q. Let's go to Exhibit 4798. You're familiar with the

22 work of Dr. Weinstein, are you not?

23 A. Right. He testified in Joe Camel.

24 Q. Accuracy of smokers' risk perceptions. Let's go to the

25 table he presented.

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Source: https://www.industrydocuments.ucsf.edu/docs/hjhd0001

1 Now, this is going to be hard to read, but in Table 3,

2 he presented all of the research on the difference between

3 smokers' and nonsmokers' view of smoking bias, correct?

4 A. This is a summary he prepared for the Joe Camel case,

5 yes.

6 Q. Wherever it was prepared --

7 A. That's his view of research.

8 Q. But he has your articles down there, does he not?

9 A. That's correct.

10 Q. And he presents all the other literature on this issue,

11 correct?

12 A. I'm not sure it's all, but it's a lot.

13 Q. A lot more than you presented to this jury. Let's put

14 it that way, okay?

15 A. That's correct.

16 Q. Let's see the conclusions based on the difference

17 between smokers and nonsmokers. Table 4 continues with the

18 same set of articles, correct? Let's go to his conclusions

19 if you have it. I think it's back on the other page, Steve.

20 The risk minimization and personal exclusion

21 tendencies -- by that it means, well, I'm smoking, but I'm

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22 not going to get sick; it's a sense of optimism about

23 themselves. You understand that's what he means?

24 A. That's his hypothesis, yes.

25 Q. -- applies as much to adolescent smokers as to adult

1 smokers. Adolescents give lower ratings for the amount of

2 harm caused by occasional and experimental smoking, as did

3 their parents. Do you see that?

4 A. Yes.

5 Q. Clearly there is some acknowledgment of risk by

6 smokers. Nevertheless, they minimize the size of that risk

7 and show a tendency to believe that the risk applies more to

8 other smokers than to themselves. People may be quite aware

9 of well publicized risks and even overestimate their

10 numerical probability -- your study -- but they resist the

11 idea that the risks are personally relevant.

12 Do you see that there?

13 A. That's his hypothesis, yes.

14 Q. That's his conclusion based on his review of all of the

15 studies in the literature; fair enough?

16 A. Based on the optimism studies in his area.

17 Q. Including the study -- including your

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study?

18 A. That's correct.

19 Q. So in other words, he included your work, he included

20 the work of all those other authors?

21 A. That's correct.

22 Q. And he reached this conclusion, correct?

23 A. Which were consistent with his model to begin with,

24 yes. That's his effect, the optimism effect.

25 Q. Let's go to the next, Segerstrom. This is 4799. Are

1 you familiar with Dr. Segerstrom's work, Optimistic Bias

2 Among Cigarette Smokers?

3 A. I may have read the abstract. I don't think I've read

4 the whole thing.

5 Q. Let me read part of it to you. "More people than is

6 logically possible believe that they are less likely than

7 average to experience negative life events, such as disease,

8 divorce, unemployment, or crime victimization."

9 That's the general concept, correct?

10 A. That's what you just read, yes.

11 Q. Let's go to the next one if you have it. Is there

12 anything else?

13 "One is motivated to believe that the behavior is not

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14 harmful, thereby preserving self-esteem. Increased risk of

15 controllable disease..." Do you see that?

16 A. Yes.

17 Q. Okay.

18 MR. BIERSTEKER: Your Honor, I would object to

19 just reading the passages. I think he needs to ask the

20 witness whether he agrees or disagrees.

21 THE COURT: You do.

22 MR. WITHEY: I'm going to ask the witness

23 questions about this, Your Honor. I just wanted to get all

24 of them in first, if I could.

25 THE COURT: Go ahead and ask the question.

1 Q. All right. Do you understand, therefore, that

2 Segerstrom is describing the general notion of optimism

3 bias?

4 A. Okay.

5 Q. Again, a topic that you have not addressed in any of

6 your published work.

7 A. That's not true. I mean, I've written passages in my

8 first book, Learning About Risk, where I actually test this;

9 not for smoking, but with respect to chemical hazards.

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10 Q. Let's move forward to the Arnett. You showed one of

11 Dr. Arnett's, one of Arnett's charts. I wonder if you've

12 also been shown this one by defense counsel. "I doubt that

13 I would die from smoking even if I smoked for 30 or 40

14 years."

15 Do you see the differences on this between smokers and

16 nonsmokers?

17 A. I know there are differences, yes, but all of them were

18 still low numbers.

19 Q. But there is a difference between smokers and

20 nonsmokers, correct?

21 A. Yes.

22 Q. And there is a higher belief by adolescents that

23 they're going to die from smoking even if they smoke 30 or

24 40 years than from adults, correct, at least according to

25 this data?

1 A. More adolescents doubt it. Is that what you're

2 saying?

3 Q. Yes.

4 A. Yes.

5 Q. Okay. Let's go to '93. "I could smoke for a few years

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6 and then quit if I wanted to." 60 percent of adolescents

7 stated that this was true, correct?

8 A. Yes.

9 Q. This evidence, does it not, supports the proposition

10 that adolescents when they're starting to smoke aren't

11 thinking of themselves, at least 60 percent of them, as

12 people who are going to smoke more than a few years?

13 A. That is true of a lot of adolescents.

14 Q. Okay. Next? Let's go -- we don't need that. Finally

15 let's go to page -- some of the tables from your book,

16 because I want to display some of the results you've reached

17 on some of the open-ended questions.

18 Do you recall Table 5-1 in your book?

19 A. Not offhand.

20 Q. I'm going to show it to you. Table 5-1, you talk about

21 the distribution of responses to the open-ended memory

22 probe. Do you see that there?

23 A. Right.

24 Q. Page 89?

25 A. I've got it.

1 Q. And this is a busy chart, but I just want to call your

2 attention to a few numbers on here. Isn't it

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true that when

3 asked the reaction to the mention of cigarettes as causing

4 lung cancer, in the full sample 15 percent mentioned that,

5 correct?

6 A. That's not a reaction to the statement. The question

7 was, you know, was to ask people's overall reaction to

8 cigarettes, and 15 percent of them, unprompted, lung cancer

9 was the first thing that came to their minds.

10 Q. Of the former smokers, about the same percentage said

11 it costs too much, correct?

12 A. That's correct.

13 Q. Now, you also present tables in your work, Table 2-2,

14 are you familiar with that, that looks at the source of the

15 risk? Do you recall that. If you could turn to it.

16 A. What page is this?

17 Q. Then we'll be done. What page is that on, Table 2-2?

18 A. 26? That table?

19 Q. Yes. And Table 2-2, you talk about the ordering of

20 perceived risk for 30 activities and technologies. Do you

21 see that?

22 A. That's correct. These are the Slovic, et al. results.

23 Q. Now, as I understand this chart, of college students,

24 they ranked smoking as number 4, active club members ranked

25 it as number 3, and the League of Women Voters selected it

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as number 4. Correct?

A. That's correct.

Q. And then on the previous page, however, you have the source of the risk chart that compares the actual fatality rate between cigarette smoking, cancer of all kinds, motor vehicle accidents, and other work accidents and other ways people can die, correct?

A. That's correct.

Q. And for sure, cigarette smoking far outweighs even the total of all the other sources of risk, correct?

A. It's a really big risk. Yes.

Q. Okay. So therefore, college students, active club members, and the League of Women Voters were wrong or uninformed when they said it was the third or fourth risk; in fact, it is the first risk; fair enough?

A. I'm not sure whether people answering the question, if you're a nonsmoker, were answering about the risks that they actually faced, so would smoking come up as a risk if you're not a smoker? So would you even think of ranking that?

Q. Finally, you've agreed that information transfers

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21 affect risk behavior and risk beliefs, and thus consumption?

22 A. If it's new information provided in a convincing

23 manner, yes.

24 Q. You have not gone to the Internet site of the 33

25 million documents in Minnesota to do a search of the

1 documents of what the tobacco industry perceived to be the

2 effect of their conduct on their customers, have you?

3 A. That's correct.

4 Q. And you've not asked for documents from the defendants

5 of their internal files which describe what the tobacco

6 industry's marketing, advertising, and public relations

7 program was designed to do, have you?

8 A. No, I have not.

9 Q. In fact, it is true that manufacturers of --

10 manufacturers can communicate the risks of their product to

11 their customers?

12 MR. BIERSTEKER: Same objection, Your Honor.

13 THE COURT: Overruled.

14 A. Well, since the true risk of smoking is less than

15 people's risk beliefs, they get in big trouble trying to

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16 convince people what the true risks of smoking are at the

17 current time.

18 Q. And your position is that your testimony is not going

19 to be swayed by any internal company documents, correct?

20 A. I'm interested in what people's risk beliefs are

21 compared to the scientific estimates. Those are the only

22 two issues I care about.

23 Q. But haven't you testified "my positions are not going

24 to be swayed by looking at internal company studies"?

25 A. Because that is not relevant to that comparison. I

1 answered that question in your deposition.

2 Q. And the answer is yes?

3 A. Yes.

4 Q. So you have not sought in your work to investigate what

5 the tobacco industry did, in fact, to influence risk

6 perception?

7 A. No.

8 MR. WITHEY: Thank you very much. No further

9 questions.

10 REDIRECT EXAMINATION OF W. KIP VISCUSI

11 BY MR. BIERSTEKER:

12 MR. BIERSTEKER: I have just a few

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questions, Your

13 Honor.

14 THE COURT: Yes.

15 Q. Mr. Withey asked you some questions, professor, about

16 risk perceptions and the weight of the release of certain

17 internal company documents in the mid 1990s, and I wanted to

18 place back on the elmo the exhibits that you discussed in

19 your direct testimony.

20 Is there a material difference between the risk

21 perceptions in 1985 versus 1997 with respect to the

22 mortality risk of lung cancer?

23 A. No. Both of these are national samples, and the

24 numbers 43 percent and 47 percent, they're not that much

25 different.

1 Q. Now, let's talk about the risk of mortality. The 1985

2 survey did not ask about mortality in total, right?

3 A. That's right.

4 Q. So let's compare 1991 to 1997: Is there a material

5 difference there?

6 A. No. It is 54 percent and 50 percent. They're very

7 similar.

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8 Q. And finally let's turn to life expectancy. Is there a

9 material difference between the 1991 and the 1997 results?

10 A. Some upward drift, but I would attribute that largely

11 to the fact I have a national sample rather than a North

12 Carolina sample, which is the leading tobacco-producing

13 state. We'd expect lower risk estimates.

14 Q. Professor, are there any data prior to 1985 that

15 permits you to assess what the public's perception of the

16 absolute risk of lung cancer or total mortality are related

17 to smoking?

18 A. No.

19 Q. There were data, I believe you testified, for people

20 who were 16 to 22 years old in your 1985 survey. How did

21 the perceptions of the risks of smoking by that group

22 compare to adults' perceptions of the absolute risk of

23 smoking?

24 A. I had a whole article on that one, which is that the

25 younger age group actually assessed the risk of lung cancer

1 as being higher than their older counterparts, and I

2 attribute it to the fact they have been raised

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in a much

3 stronger antismoking environment.

4 Q. Were the younger people's perceptions of the risks of

5 smoking greater or lower than the actual risk as you

6 calculate it?

7 MR. WITHEY: Objection. Foundation.

8 THE COURT: Overruled.

9 A. They were substantially greater, because they're

10 greater than the average for the whole sample, which also

11 was greater than the estimate of the true risk.

12 Q. Professor, Mr. Withey discussed with you a little bit

13 the divergence between people's perceptions of the risks to

14 themselves personally of smoking compared to what they

15 perceived to be the risks as an objective matter as it

16 applies to everybody. If a person thinks that they're going

17 to quit smoking and they're asked what is the risk to you of

18 smoking, what effect will that have on their perception of

19 the risks of smoking to themselves as compared to lifetime

20 smokers, which was the question you were asked?
.

21 MR. WITHEY: Same objection, Your Honor.

22 THE COURT: I think it is beyond the scope.

23 Q. Mr. Withey asked you a little bit about your 1991

24 survey. Are the results of that survey retained

25 electronically?

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A. I've published the results of the survey.

Q. And the data are retained electronically?

A. I'm not sure I have all the original data electronically. I kept it for a while, but it may have gotten lost in the move three years ago.

Q. Do you know if the work that Mr. Withey showed you and put on the overheads from Dr. Arnett appears in the peer reviewed published literature?

A. No, I don't.

Q. Does the fact that some people may discount the risks to themselves personally change in any way their appreciation and understanding of the magnitude of the risks generally?

A. No. I've developed these questions for EPA where the best way to get at people's risk beliefs is to ask them what's the risk to a reference population. They understand that much better than asking them what's the probability to themselves. It is a better way to processing the information.

MR. BIERSTEKER: Thank you. I have nothing further, Your Honor.

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22 THE COURT: You can step down.

23 Do you wish to make any interim argument?

24 MR. BIERSTEKER: Yes, Your Honor, I would.

25 THE COURT: This is an opportunity for the parties

1 again to comment upon the testimony that's just been given,

2 but it is not evidence in and of itself. Mr. Biersteker?

3 MR. BIERSTEKER: Ladies and Gentlemen of the

4 Jury: What we've seen here is a professor who is a

5 prominent expert on risk, a founder of a scholarly journal

6 devoted to that subject. And he came in here, and unlike

7 some of the other witnesses you've heard from the

8 plaintiffs, he based his testimony on real data and his real

9 analysis of it. And based on that evidence, there is no

10 evidence here that the conduct of the defendants had any

11 effect on the real world decisions made by real people to

12 smoke.

13 People think that the risks of smoking are greater than

14 what they actually are. Not only that, they are far from

15 being duped into this belief by anything these companies

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16 did. People think smoking is risky, that is what the data

17 shows. There's been no contrary data by the plaintiffs.

18 That data doesn't go back to the 1950s and '60s, they

19 don't exist. The first data generated on the subject was

20 1985. But Professor Viscusi had done other work that

21 relates to that issue, and what he said is that when people

22 are faced with conflicting sources of information, one from

23 the government, for example, who says smoking is risky,

24 although his analysis was done in the context of chemical

25 substances, but when the government says something is risky

1 and private industry says it's not, people gravitate toward

2 and believe the worst case scenario.

3 And if you apply that analysis to what happened in the

4 earlier part of this decade -- of this century, rather, I

5 think the conclusion would be that the conduct of these

6 companies had no effect on the perceptions of risk by people

7 even back then, even though there are no data that we can

8 use to analyze that issue.

9 And what we just saw from the plaintiffs was a

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10 cross-examination that really didn't take Dr. Viscusi on in

11 the substance of his analysis. It asked a lot of questions

12 questioning his motive and his good faith, but the facts are

13 the facts, and they don't change.

14 THE COURT: Thank you. Mr. Withey?

15 MR. WITHEY: Thank you, Your Honor. We had a

16 witness here that had four studies. That's the very limited

17 basis upon which he then drew some very grandiose opinions,

18 four studies involved with the tobacco industry, that were

19 irrelevant to our claim. Because if you look at the risk

20 perception in 1985, or even 1978 and '79, Dr. Viscusi

21 himself admitted it doesn't apply to the years '50s, '60s

22 and '70s, nor did he on direct examination talk about

23 adolescents, which is where people start to smoke.

24 We cited through the literature the 18 or 19 studies

25 from which knowledgeable researchers drew those

1 conclusions. Dr. Viscusi's basis of his opinion is very,

2 very thin.

3 He tries to on redirect, tried to bootstrap in the

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4 adolescents argument. We think they failed. Why is

5 it -- but he did admit that information matters. He did

6 admit that the information transfer from the tobacco

7 industry, which he has not studied, matters to consumers and

8 their risk perception.

9 Why is it that every witness who comes in here hasn't

10 read tobacco industry documents? Why is it that Dr. Viscusi

11 didn't go and look at what their perceptions were that

12 tobacco industry had knowledge of, how they tried to market

13 to adolescents, whoever? Why didn't they do that? See no

14 evil, hear no evil, speak no evil.

15 Thank you.

16 THE COURT: We'll take just about five to seven

17 minutes. We're going to take a real short break, and then

18 we'll ask for the next witness. So this will be short. Be

19 back at about four minutes after 11:00.

20 (Recess taken.)

21 THE COURT: I will ask the defendants to call

22 their next witness.

23 MR. WEBER: Your Honor, I call Dr. David

24 Scheffman.

25 THE COURT: Would you swear the witness?

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(The Witness is Sworn)

THE COURT: Please take a seat, and state your name, and spell your last name for the court reporter.

THE WITNESS: David Scheffman.

S C H E F F M A N.

THE COURT: Mr. Weber?

MR. WEBER: Thank you, Your Honor.

DIRECT EXAMINATION OF DAVID SCHEFFMAN

BY MR. WEBER:

Q. Good morning, Ladies and Gentlemen. Good morning, doctor.

A. Good morning.

Q. Dr. Scheffman, can you tell the Ladies and Gentlemen of the Jury where you live and where you're employed right now?

A. I am a professor at Vanderbilt University in Nashville, Tennessee, in the business school. I'm on leave this year, and I teach -- when I teach I'm on campus, but I'm spending most of my time in New York City and Washington, D.C. working as a consultant.

Q. Now, doctor, did I ask you to come here and offer opinions in this case on matters of economics, advertising, conspiracy, and advertising regulation?

A. Yes.

Q. And the opinions you're going to offer

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today, are those

25 opinions based on a reasonable degree of your professional

1 certainty, based on your expertise in economics,

2 advertising, et cetera?

3 A. Yes, they are.

4 Q. Could you briefly describe your educational background,

5 doctor?

6 A. I grew up in Minneapolis. I got a bachelor's degree in

7 mathematics and economics at the University of Minnesota.

8 Then I went on to MIT in Massachusetts and got a Ph.D. in

9 economics.

10 Q. How long have you been teaching at Vanderbilt, doctor?

11 A. About ten years.

12 Q. And did you hold a university position before that?

13 A. Yes. I've taught at a number of other universities

14 before that.

15 Q. Tell the Ladies and Gentlemen what your position is at

16 Vanderbilt, your title, your duties.

17 A. My title is Justin Potter Professor of American

18 Competitive Enterprise. A long title. But I teach in the

19 business school, I teach the business strategy. I head up

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20 the business strategy area of the business school. We teach

21 MBAs, and I teach marketing courses. I teach a course on

22 the management of intellectual property that deals with

23 innovation and patents, and things like that.

24 Q. And do you teach only business school students or do

25 you also teach executives?

1 A. No. We teach -- we have two sorts of students, MBA

2 students, regular MBA students. We have students that come

3 in and have full-time jobs, and every other weekend they

4 come in and do executive MBA. If they're working at the

5 time they do executive MBA.

6 We do that, and we also have an international executive

7 MBA program where people come in four days once a month who

8 have jobs.

9 We also do a lot of executive education, that is,

10 business people come in to get training on marketing or

11 pricing or business strategy, things like that.

12 Q. Now, you mentioned that you're currently doing

13 consulting. Can you explain that?

14 A. I do consulting, I do business consulting of various

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15 kinds on marketing and innovation, things like that. I do

16 consulting like this as an expert witness. I do a lot of

17 work with companies, doing mergers and acquisitions.

18 Q. And your Ph.D. is in economics, you said?

19 A. Yes.

20 Q. Were you at one time employed by the Federal Trade

21 Commission, doctor?

22 A. Yes, I was.

23 Q. In 1979 to 1988?

24 A. Yes, I was.

25 Q. If you could open your book there, do you have tab 1?

1 Does that list the positions you held at the Federal Trade

2 Commission?

3 A. Yes.

4 Q. Can I -- that's Demonstrative 6138. Give me just a

5 real quick second, or I'll go to elmo.

6 Does that list the positions you held at the FTC?

7 A. Yes.

8 Q. Could you just briefly move through those types of

9 responsibilities you had?

10 A. Well, the FTC has two primary roles. It has an

11 antitrust enforcement role, and it also has a

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12 consumer -- it's the main consumer protection agency in the

13 federal government. It regulates advertising, enforces

14 warranty, unfair and deceptive act practice against

15 consumers.

16 What economists do for that agency, which is run by

17 lawyers, of course, is we support the efforts of the agency

18 in developing evidence, doing economic analysis in support

19 of the commission's mission to enforce the consumer

20 protection antitrust laws.

21 We do studies, collect data, so as a senior economist

22 when I got to the commission I worked on a lot of consumer

23 protection matters on warranties and advertising, and things

24 like that.

25 I moved to do a lot more on antitrust in about 1982,

1 where I spent a lot of time on antitrust, and I was the head

2 antitrust economist until 1986.

3 In 1985 the bureau director left, I became the head

4 economist of the Federal Trade Commission, which I was until

5 1989. And in that role the economists are involved in

6 everything the commission does, even though it's

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run by

7 lawyers. Economists do support work, provide memoranda to

8 the commission on almost anything the commission does,

9 analyze data, do studies.

10 That's the sort of thing we do.

11 Q. In connection with your work at the Federal Trade

12 Commission did you from time to time, and persons who were

13 working under you, meet with other agencies in the federal

14 government?

15 A. Yes.

16 Q. Could you just describe that again briefly?

17 A. The FTC regularly meets with the head of the FDA or the

18 people in the Surgeon General's office, HHS.

19 Q. Now, did you also while you were at the FTC have

20 occasion to learn about the history of government regulation

21 of cigarette advertising?

22 A. Yes.

23 Q. And did you have occasion to delve into and learn about

24 the history of competition in the cigarette industry?

25 A. Yes.

1 Q. Now, have you published in areas relevant to your

2 testimony today?

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3 A. Yes.

4 Q. Let me just ask you to go through a few topics. Have

5 you published in the area of conspiracy and economic

6 analysis of alleged conspiracy?

7 A. Yes.

8 Q. Have you published in the areas of economic analyses of

9 advertising and marketing practices?

10 A. Yes.

11 Q. Have you published in the area of economic analyses of

12 product innovation and research and development?

13 A. Yes.

14 Q. And have you taught in those areas, as well?

15 A. Yes, I have.

16 Q. Now, let's briefly go through your methodology so that

17 the Ladies and Gentlemen of the Jury understand what it is

18 you did here. Did you undertake an analysis of the

19 allegations in this case concerning the existence of a

20 conspiracy involving these defendants?

21 A. Yes, I did.

22 Q. Turn to tab 3 if you could. Let me ask you if that

23 describes -- if that's a chart you put together summarizing

24 the first steps you took in evaluating this conspiracy. It

25 should be tab 3 there.

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A. Yes.

Q. Is that it?

A. Yes.

Q. Would that help you in describing that to the jury?

A. Yes, it would.

Q. This is Demonstrative 6141. Could you just briefly, again, doctor, because I want to move through this part with some dispatch, just summarize what it is you did in your first steps on evaluating the allegations?

A. Well, economists use economic methodology and look at data and facts and numbers. It's what we do. When we look in connection with this situation, the thing that economists would look at, we'd look at the domestic, the U.S. marketplace, and what was going on in the U.S. marketplace over the last 50 years or so; what was going on internationally; the regulatory environment in the U.S. is very important for -- in cigarette smoking. The information environment, what sort of information was available to people in the medical community, et cetera. And what did the cigarette companies who competed in the U.S. actually do during this period.

Q. Would you turn to tab 4, and let me ask you whether

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23 that's a continuation of this chart about the types of

24 evidence you looked at in this inquiry.

25 A. Yes, it is.

1 Q. That's Demonstrative 6142. Again, could you just

2 briefly reference some of the things you looked at in

3 connection with the work you did here?

4 A. Well, in connection with analyzing the allegations in

5 this case I've looked at lots of documents that were

6 produced in this case. I looked at reports of the experts,

7 of various experts in the case, and some of the testimony.

8 But my main job as an economist is get together data and

9 facts, and my main challenge was there are allegations going

10 back more than 45 years.

11 I had to go back and look at as best I could figure out

12 what was actually happening. We have some record from the

13 documents of things that may have been happening, but I went

14 to public source material to try and reconstruct what

15 actually was happening back in 1954 onward. So I looked at

16 Congressional hearings, there is a great number of

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17 Congressional hearings dealing with the cigarette industry.

18 I looked at the Surgeon General and other government

19 reports. I looked at lots of -- I searched business

20 publications, newspapers, magazines, economics journals,

21 medical journals, all to piece together as best we can

22 reconstruct what was happening going back into the early

23 1950s, and since, and then looked at internationally, what

24 was happening internationally. Looked at international

25 public source material.

1 Q. Why didn't you just look at the documents from the

2 companies? Why didn't that answer everything that was going

3 on?

4 A. Well, what the role of an economist is, is to get a

5 bunch of data and facts and apply economic analysis to it,

6 so having number and facts and everything is where we live.

7 We can certainly look at documents and draw inferences from

8 that, and maybe facts from documents, but our main job is to

9 look at data and facts and apply economic analysis to those.

10 Q. Now, when you talk about applying economic analysis,

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11 did you apply a standard analysis here?

12 A. Yes.

13 Q. Is it one you've used in other endeavors, both at the

14 Federal Trade Commission and academically?

15 A. Yes.

16 Q. And if you could turn to tab 5, which is Demonstrative

17 6143, does that address the contour of the analysis, the

18 methodology?

19 A. Yes, it does.

20 Q. Could you explain that to the Ladies and Gentlemen of

21 the Jury?

22 A. Well, what an economist brings to analysis of

23 conspiracy is there are certain economic logic that bears on

24 whether an alleged conspiracy is plausible, whether it makes

25 any sense it could have existed, would have been in the

1 interests of the parties to do it, in their economic

2 interests.

3 That's one thing we can do, and there is some economic

4 logic we can bring to bear on that.

5 But the more important is usually looking at all of the

6 evidence as to what actually happened in the marketplace and

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7 what the parties of the conspiracy actually did. That's

8 very important, because they may find they did things

9 completely inconsistent with the conspiracy.

10 And finally we look at the effects. The conspiracy,

11 alleged conspiracy, usually has predicted effects.

12 Something was supposed to happen. So we analyze whether

13 that did happen or whether something else happened, or what

14 actually did happen.

15 Q. Now, based on your review and the methodology you've

16 described, and your professional expertise, doctor, have you

17 formed an opinion as to whether or not the evidence is or is

18 not consistent with the existence of a conspiracy of the

19 type alleged in this case?

20 A. Yes, I have.

21 Q. And what is your opinion?

22 A. My opinion is that the evidence is inconsistent with

23 the conspiracy alleged.

24 Q. Now, let's move to the first topic, and again, as I

25 say, I want to move through this with some order. If I ask

1 you a question, doctor, that you don't understand, you're

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2 not sure of, let me know immediately and I'll reword it.

3 Okay?

4 A. Yes.

5 Q. Okay. Now, did you as part of your analysis conduct a

6 comparison of the U.S. cigarette market with foreign

7 cigarette markets?

8 A. Yes, I did.

9 Q. Now, why was that relevant?

10 A. One of the basic methods of economic analysis of a

11 conspiracy as we look at a situation where someone is

12 alleging there was a conspiracy going on is to look at

13 other, other markets like that as a basis of comparison.

14 It's what we call a benchmark. Look at what happened here,

15 what was alleged to be going on; let's look at other places

16 and see what was going on there. That often gives us very

17 interesting evidence that tells us either it looks like

18 there was a conspiracy or it looks like there wasn't.

19 It's what we call benchmark analysis, and that's really

20 probably the most important analysis an economist brings to

21 the analysis of conspiracy.

22 Q. Now, when you looked at the foreign market experience,

23 what types of evidence or issues did you look at?

24 A. Well, as I understand the alleged conspiracy here, the

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25 world and the U.S. would have looked very different but for

1 the conspiracy. There would be all sorts of cigarette

2 products on the market, at various times in the past, that

3 we've never seen, and that smoking behavior would be quite

4 different.

5 So I looked at those things, those, as I understand, as

6 what I look at is economic predictions about what the effect

7 of the alleged conspiracy would be: The world would be

8 different in the U.S. What would those differences be?

9 And the important differences I've identified is there would

10 be a lot of products that don't exist now, and that smoking

11 would -- incidence of smoking measured in various ways would

12 be very different.

13 Q. Let's start with the product innovation issue. All

14 right?

15 A. Yes.

16 Q. Why is it -- let me strike that. What evidence did you

17 look to when you looked to these foreign markets about

18 product innovation, how did you go about thinking about that

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19 comparison?

20 A. Okay. Well, I looked at foreign markets because there

21 is many, many cigarette markets across the world. Each

22 cigarette market is essentially a country, so there is a

23 cigarette market in England and France and Germany and

24 China, and there is many countries, many different cigarette

25 markets, many different cigarette companies all over the

1 world.

2 So I looked at and got all sorts of different markets,

3 all sorts of different cigarette companies, all sorts of

4 different governments that have policies on cigarettes and

5 smoking and health.

6 What I did is look in those other markets and see what

7 products were introduced there, what sort of innovations

8 were there there compared to here.

9 Q. Did you need to start out understanding the United

10 States experience first?

11 A. Yes, that was part of my -- was researching what sort

12 of innovations there had been in the U.S. going back to

13 before 1950.

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14 Q. Now, could you turn to I think it should be tab 6, and

15 ask you again just very briefly to say what the chart is,

16 and then I'll put it up, doctor.

17 A. Yes. This is a chart that displays how fast filters

18 came in in the United States, beginning in the early '50s.

19 Q. This is Demonstrative 6169 A. And can you explain what

20 the significance of this chart is as part of your

21 benchmarking analysis?

22 A. Well, while the blue line there is the percentage of

23 the market that was sold that had filters --

24 Q. Doctor, we have a pointer there, if it helps.

25 A. Very good. This blue line, that's the percentage of

1 products of the cigarettes that had filters. I was alive in

2 the early '50s, and certainly the early '50s there were

3 hardly any filter cigarettes sold.

4 Very quickly the market moved to filters, very, very

5 quickly. The red line is the percentage of nonfilters,

6 which was the mirror image. The market moved very quickly

7 to filters.

8 Q. And what country is this market we're looking at here?

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9 A. This is the United States.

10 Q. Turn to tab 7, if you would, and again just briefly

11 describe that chart.

12 A. What I did is look on more important characteristics of

13 cigarettes, which is tar and nicotine content in the

14 cigarettes. So I looked at in terms of what was available

15 in the market at various dates, what was the lowest tar and

16 nicotine product available in the market going back to the

17 early '50s.

18 Q. And is that -- could you turn to tab 7, I think?

19 A. Yes.

20 Q. Is that a chart that addresses that very point?

21 A. Yes.

22 Q. Could you explain that one?

23 MR. WEBER: This is 6157 A, counsel.

24 A. This is -- we're talking about almost 50 years ago, and

25 we're trying to get data on almost 50 years ago now.

1 It turned out actually the Reader's Digest was very

2 active in the early '50s, and they actually measured, they

3 paid laboratories to measure the tar and nicotine content of

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4 cigarettes, and they reported, they were actually the first

5 major entity in the U.S., and it was published widely. Tar

6 and nicotine. That's what these data, these first data

7 are.

8 And then in 1967 the Federal Trade Commission took

9 control of tar and nicotine, and they are the official

10 reporters and measurers of tar and nicotine in the U.S.

11 So what this shows is this very rapid decline in tar

12 content of cigarettes, that is, that there were products

13 available on the market, very low tar, that were offered on

14 the market very, very quickly.

15 Q. Now, I want to show you one more chart, and I'm now

16 going to ask you to comment on the significance of these

17 last three charts in summary.

18 Would you turn to slide 8, please, and you mentioned a

19 moment ago that reduction in nicotine. Is that what that

20 chart relates to?

21 A. Yes.

22 Q. This is Demonstrative 6164 A. And again, can you tell

23 us what that one shows?

24 A. You see the same thing, this is Reader's Digest data.

25 Then there is a period where they're not reporting it, and

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1 the FTC takes it over. Again, shows this very rapid decline

2 in the measurement of nicotine of products that are offered

3 in the marketplace.

4 Q. Now, in connection with your examination of the issues

5 of product innovation in the U.S. market, you just showed a

6 chart on filter sales and the percentage of the market that

7 was filters, and then you showed a chart on reduction and

8 tar reduction and nicotine.

9 What significance are those charts to the analysis you

10 were making?

11 A. This is a primary measure of innovation, is my

12 conclusion. That is, in those days the reduction in tar and

13 nicotine was the main innovation, very rapid in the U.S.

14 It arose as a result of competition between the

15 companies in the U.S. introducing products that had lower

16 tar and nicotine.

17 Q. Now that you understood this experience in the U.S.,

18 did you analyze, undertake some studies to what was going on

19 in these other markets that you were doing as part of your

20 benchmark analysis?

21 A. Right. The whole idea of the benchmark would be we

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22 identified something that happened in the U.S. which is

23 relevant to the contentions in this case, which is how much

24 innovation was there in the cigarette industry, and the

25 benchmark analysis is, well, let's look at the rest of the

1 world and see what's happening during the same period.

2 Q. And what conclusion did you draw on that?

3 A. The conclusion I draw, if you look for the rest of the

4 world, the U.S. led, strongly led most places in the world.

5 There were two small countries that were somewhat faster,

6 but most of the rest of the countries were 10 to 15 years

7 later in achieving these results that were achieved in the

8 U.S.

9 Q. And did you bring an example of one of the sources for

10 that opinion, and that's found at tab 9?

11 A. Yes, I did.

12 Q. And this is from Exhibit AS 266.

13 Article by Hoffman and Hoffman. Can you summarize this

14 for us, doctor?

15 A. Yes. Dr. Hoffmann is a prominent researcher on smoking

16 and health. It starts out with the numbers, just talking

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17 about how fast the penetration of filters was. Just in

18 comparison here, 50.9 percent already in 1960 of the sales

19 were with filter, in Japan it was about 3 percent at the

20 time. So that was one benchmark market.

21 So what Dr. Hoffmann's conclusion stated, which was

22 consistent with my research, is that in most countries we're

23 10 to 15 years slower than the U.S. Switzerland and Germany

24 were somewhat faster by these measures in penetration of

25 filter, but not a lot.

1 And that's consistent with my research, that very rapid

2 penetration of filters and very rapid reduction in products

3 available with low tar and nicotine.

4 Q. Now, in the interest of time, doctor, I'm not going to

5 go through other articles on this point, did you find other

6 articles that supported this very conclusion?

7 A. Yes. It's a well-known result, well-known conclusion.

8 Q. Did you also look at the sales weighted tar and

9 nicotine average and compare the average in America to that

10 overseas?

11 A. Yes. To be clear, when we described those

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minimum tar

12 and nicotine falls, those were the minimum available in the

13 marketplace. They don't show what people actually smoke,

14 that they were available out in the marketplace and being

15 sold. And I also looked, were they promoted, and did

16 analysis of that.

17 The lower tar and nicotine products were generally

18 always promoted more vigorously in terms of advertising than

19 the other products.

20 But we also look at what happened in the marketplace,

21 and what happened in the marketplace, as best we can piece

22 together from the data, is, again, weighted average tar and

23 nicotine that's actually consumed in the marketplace fell

24 much faster in the U.S. than almost anywhere else in the

25 world.

1 It's difficult to get those numbers, because you can

2 get tar and nicotine to some extent, sales weighted averages

3 are difficult to get. But from the data that's available

4 and the penetration of filters, which was the primary method

5 for reducing tar and nicotine in the early days,

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my research

6 and other research indicates that actually in the

7 marketplace the average cigarette that the average smoker

8 was smoking had significantly less tar and nicotine than in

9 most countries in the world.

10 Q. Now, one other factor you mentioned when you first

11 described your benchmarking analysis was the issue of

12 looking at the rate -- measurements of the rate of smoking

13 in other countries versus the United States. Do you

14 remember that?

15 A. Yes.

16 Q. Why is that relevant?

17 A. Well, as I understand the contentions in this case, is

18 that there is two things would be very different in the U.S.

19 but for the alleged conspiracy: The products would be

20 different, and there would be safe products and everything.

21 The smoking would be a lot less and different in different

22 respects.

23 So I got together data to look at what we know about

24 smoking incidence in the U.S. versus what we know in other

25 countries.

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1 Q. Now, could you just look quickly at tabs 14 and 15, and

2 let me ask you the question for both, and then we'll work

3 our way through them.

4 Are those charts that you put together that address the

5 very question you just mentioned?

6 A. Yes.

7 Q. Let's start with number 14, and I hope people can see

8 that. This is a smoking prevalence chart for women in

9 various countries.

10 A. Yes.

11 Q. And can you start on the left and tell us about the

12 left axis, and then along the bottom, and explain what this

13 displays and where the data comes from?

14 A. This is a study done by the World Health Organization,

15 probably the most careful study of prevalence across

16 countries. Their measure of prevalence was what percentage

17 of the males or females were daily smokers. And they worked

18 together with countries with public health agencies in

19 different countries, and they got the data together, and

20 they reported the study in 1997.

21 Now, these data, these data indicate, this is the

22 percent in Denmark that the percent of women who were daily

23 smokers was about 37 percent. Now, this is not -- these are

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24 not necessarily the same date, these are surveys that were

25 done pursuant to this study, I think, between '94 and '96,

1 '92 to '94 -- I forget. It's different years sometimes,

2 one year -- the year for Greece might be different than the

3 year for Switzerland in the survey, but the prevalence

4 doesn't change that much from year to year. So this is an

5 accurate depiction of prevalence. Okay.

6 So we have all these different countries. What

7 percentage of daily women smokers there are, this is in

8 recent period as of, say, around five years ago or so. The

9 blue column is the U.S. Okay. And what this shows is

10 prevalence.

11 Prevalence data comes from surveys, so it's not

12 perfectly accurate. So I can't say that Ireland prevalence

13 is higher than Austria. There's too much potential error in

14 the survey for us -- for me to distinguish between that, but

15 these numbers are relatively close. The researches are

16 relatively close.

17 What it shows is the U.S. looks at least like the rest

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18 of the world. I've chosen here to look at -- I'm not

19 looking at China and Cuba, I've looked at all western --

20 developed western European countries, Japan, Australia,

21 things like that, so things that I thought would be more

22 comparable in terms of income and demographics.

23 The U.S. is undoubtedly in the ballpark with everyone

24 else, and maybe somewhat lower than a lot of other

25 countries.

1 Q. And that was Demonstrative 6172, was it?

2 A. Yes.

3 Q. Let me show you 6171, which is the chart -- I'm

4 sorry, I'm forgetting which system I'm on -- which is the

5 chart for males.

6 And again, I think this shows the same general

7 methodologic approach, so could you just briefly summarize

8 with respect to this chart and the one before what it is

9 you're seeing?

10 A. This is again for men, the same thing again that I went

11 through extremely quickly. We're comparing countries,

12 Denmark and the Netherlands and U.K. And on other things

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13 like that, we're not compared to China and other countries

14 like that, and we're looking at a careful study of what

15 percentage of men are daily smokers in the U.S.

16 And again, at a minimum, the U.S. looks like the rest

17 of those countries, and it may be somewhat lower.

18 Q. Now, with respect to this issue, the measures of the

19 amount of smoking in a country, which from this WHO study is

20 prevalence, what conclusion do you draw that is relevant to

21 your benchmarking analysis?

22 A. Again, as I understand the contention of the

23 conspiracy, one of the things that would be a lot different

24 today would be smoking behavior in the U.S. but for this

25 alleged conspiracy. But what we see is smoking behavior in

1 the U.S. looks at least as good as everywhere else across

2 the world of all other developed countries, so there isn't

3 any discernible -- any footprint, any fingerprints of this

4 conspiracy having this effect.

5 Q. Now, let's move on to another aspect. Did you also

6 look to see whether over this period, this 45 years or so,

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7 doctor, whether the public health community here or abroad

8 or governments here or abroad have stated that any company

9 outside of the United States has produced a product accepted

10 as safer than those that were made available by companies in

11 the United States?

12 A. No. There is no product ever been marketed anywhere in

13 the world that any scientific consensus or government entity

14 has said is safer than products that were available at the

15 same time in the U.S.

16 Q. What is the significance of that fact to your inquiry?

17 A. Is that there is no -- one of the central allegations

18 in the case is that there would have been safer products,

19 much safer than low tar and nicotine. There is no such

20 product that has ever been marketed anywhere in the world.

21 Q. Now, did you also look over the period of the past 25

22 years or so as to whether -- let me strike that and start it

23 over so I'm clear.

24 You talked about reductions in tar and nicotine,

25 correct?

http://legacy.library.ucsf.edu/tid/lnq05a00/pdf
Source: https://www.industrydocuments.ucsf.edu/docs/hjhd0001

1 A. Correct.

2 Q. And how quickly that market changed here in America?

3 A. Yes.

4 Q. Did you look both at America and internationally at the

5 issue of whether in the past 25 years or so there were

6 alternative design cigarettes?

7 A. Yes.

8 Q. Untraditional design cigarettes that were introduced on

9 the marketplace?

10 A. Yes.

11 Q. And can you again just briefly mention what you found

12 when you did that analysis?

13 A. I looked, and what you see is in the 1970s in England

14 there were cigarettes marketed that had about 25 percent

15 nontobacco. It was a test to see whether people would smoke

16 a cigarette that was not made of tobacco. That was tried,

17 it was a cooperation between the English government and the

18 companies. They introduced these products, there were 12

19 brands introduced. They very quickly failed. The German

20 companies introduced products with considerably more

21 nontobacco product cigarettes. Those were introduced and

22 they very quickly failed.

23 So those were things that were done in the 1970s and

24 had been known for a long time, they were tried in the

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25 marketplace, and the problem is smokers didn't accept them.

1 You don't see anything happen, any other thing of

2 significance happen in the rest of the world or anywhere in

3 the world in terms of different designs until RJR came out

4 with Premier, which was introduced in the late '80s. That

5 was the first really totally different design product that

6 was actually on the market for a while, and tried, and was

7 test marketed.

8 You have a product introduced by Philip Morris called

9 De-Nic, that you probably heard of De-Nic, which was a

10 product that took virtually all the nicotine out of the

11 product. That was the first time that product showed up in

12 the world.

13 Then you had Eclipse, which was RJR's -- when Premier

14 failed they introduced a product Eclipse, which is still

15 sold in Tennessee and other places, which is something like

16 the Premier product. It doesn't burn tobacco.

17 And then you have on the marketplace now Accord, which

18 you may have heard of, which is actually an electric smoking

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19 device. It is a thing with a battery, and you put the

20 cigarette in and you push the button, you push the button

21 on, and it heats up the tobacco. Another cigarette product

22 that doesn't burn the tobacco.

23 Those are the major innovations in the history of

24 products that have actually been put out on the

25 marketplace.

1 Q. And were those major innovations, as you described

2 them, put on the marketplace by the alleged conspirators or

3 by companies that weren't in the conspiracy?

4 A. They were put in the marketplace by U.S. tobacco

5 companies.

6 Q. Now, are you familiar with the Independent Committee on

7 Smoking and Health in Great Britain?

8 A. Yes.

9 Q. And the chairman of that, Dr. Peter Froggatt, are you

10 familiar with his work?

11 A. Yes.

12 Q. The jury has heard about the independent committee, the

13 Froggatt committee on a number of occasions, so we don't

14 need to get into that, but let me just ask you this: Did

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15 Dr. Froggatt have a statement with respect to substitutes

16 and other design innovations?

17 A. Yes.

18 Q. Could you turn to tab 16. Let me ask you, is that the

19 quote, the statement of Dr. Froggatt?

20 A. Yes.

21 MR. WEBER: This is from AIW 3645, counsel.

22 Q. And this is from an article by Froggatt and Waller on

23 product modification?

24 A. Yes.

25 Q. And the product they're talking about is?

1 A. Cigarettes.

2 Q. Can you read that statement to the jury, and then just

3 briefly let them know what the significance of that is, Dr.

4 Scheffman?

5 A. All right. "The failure of the substitutes sounded a

6 knell for radicalism in product modification; thereafter,

7 the ISCSH and the tobacco industry" -- this is in

8 England -- "were forced to a strategy of gradualism,

9 reducing tobacco yields by such means as effective filters,

10 increasing the porosity of cigarette papers, introducing

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11 ventilation holes near the tip of the cigarette, and

12 ingenuities in tobacco chemistry and blending."

13 Q. And the significance of that statement?

14 By the way, I'm sorry to interrupt. This is a 1996

15 article, correct?

16 A. Yes.

17 Q. And the significance of that?

18 A. This is an article by Mr. Froggatt, which is giving his

19 summary of the U.K. experience, which is they tried these

20 nontobacco products and they failed, and they said their

21 conclusion was there isn't any other product, the only

22 approach was to reduce tar and nicotine.

23 And what they did in connection with -- Froggatt and

24 the U.K. government worked with the companies in the U.K.,

25 and they set targets to reductions of tar and nicotine to

1 get tar and nicotine levels down. They were still

2 considerably -- this was started in 1973. Tar and nicotine

3 levels were much higher in the U.K. than they were in the

4 U.S., so they set targets and worked with the companies in

5 the industry to reduce tar and nicotine levels at targets.

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6 Something like that also happened in Germany. In 1992,

7 with the formation of the economic -- European Economic

8 Community, their standards in the European Economic

9 Community mandating for almost all of the member countries

10 that they have to reduce maximum tar and nicotine levels on

11 phase one, as of 1997, the maximum tar and nicotine level of

12 any product offered has to be like 12 for tar.

13 So this has been the approach in other countries in the

14 world, and the regulatory approach was that there aren't any

15 really safer products, the approach is to reduce tar and

16 nicotine.

17 Q. Now, doctor, I think you mentioned early on that you

18 have published in the area of product innovation and studied

19 that as part of your professional expertise?

20 A. I have.

21 Q. Are you generally familiar with a claim made here that

22 had these companies devoted more time, money, effort, they

23 would have thrown more money at this, invested better, that

24 safer products of some type would have been developed, they

25 would have appeared?

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1 A. Yes.

2 Q. Do experts on innovation, people with economic

3 backgrounds, do they believe that problems can be solved by

4 simply time and money?

5 A. Well, I think the first approach of a consultant on

6 innovation is to make clear that you can't necessarily solve

7 things with time and money. You've got to figure out what

8 is solvable in what time. Most things in the world aren't

9 the moon shot. Most things are you have to pick what's

10 possible to do and see what you can do to do it.

11 So what we look at in innovation, as economists, again,

12 we look at to measure innovation -- and this is how we look

13 at companies across in this country and across the world,

14 who do we think are the innovative companies, not how much

15 money they spend. There are lots of failed companies I can

16 show you who spent a lot of money on R&D. It's what they

17 actually did. We look at the record of what they actually

18 did. That's the measure of their innovativeness.

19 Q. And did you think about the innovativeness of these

20 companies versus the rest of the world by looking at the

21 output? By that I mean the innovations they created?

22 A. Yes. Exactly.

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23 Q. How did that compare? Did they look like conspirators

24 in that analysis?

25 A. As I said, again, in the first 15 or 20 years, the

1 industry was much more rapidly innovating than the rest of

2 the world, and the U.S. has had the only introduction of

3 breakthrough-type products of any significance in the

4 world.

5 Q. All right. Let's move off the benchmark analysis now

6 and go to another separate inquiry, which is this one. If

7 the experience with the international community is what you

8 described it is, why isn't that explainable by saying, well,

9 the whole world is in a conspiracy, everybody is in the

10 conspiracy?

11 A. Well, this is where the economists use a plausibility

12 test or a common sense test, which is, there are dozens of

13 cigarette companies across the world. Some of them are very

14 big. Japan Tobacco is a very big company. Japan Tobacco,

15 they just bought the international business of RJR. Very

16 big company. There are big companies in the U.K. there are

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17 big companies in Germany and France. There are companies in

18 China and Russia. There are lots of big companies across

19 the world.

20 There is a different regulatory environment everywhere

21 else in the world. There is a legal structure in other

22 countries in the world where you don't have product

23 liability suits.

24 The idea the rest of the world would be conspiring with

25 the alleged conspirators here to somehow not introduce safer

1 products in the U.S. just doesn't make any sense. What's in

2 it for them? They have their own market. They don't sell

3 products here. They have their own government to deal with,

4 their own legal structure.

5 So it makes no sense as a matter of economics or

6 logic. That's a plausibility test that worldwide conspiracy

7 wouldn't make any sense. Too many players, they have

8 different incentives, they face different challenges,

9 different regulatory authorities, different legal systems.

10 Q. Now, you just mentioned incentives. Let's talk about

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11 that analysis now. Did you do an analysis as to whether or

12 not the domestic companies, the defendants -- including the

13 defendants in this case, whether these companies had an

14 incentive, an economic incentive to attempt to develop and

15 market less hazardous cigarettes?

16 A. Yes.

17 Q. And what was your conclusion on that?

18 A. I concluded that they had every reason in the world to

19 develop safer products, because the market would have been a

20 lot bigger. If they could have developed a safer product

21 they would have sold more cigarettes. The market would have

22 grown.

23 Q. And relying on an approach and some research cited in

24 the Surgeon General's report, did you do an analysis and

25 prepare a chart on this very issue?

1 A. Yes.

2 Q. Could you turn to tab 17, which is 6167? And is that

3 the chart you just referred to?

4 A. Yes.

5 Q. Can you explain that to the jury?

6 A. Now, what this deals with, one of the allegations in

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7 this case is in the but-for world: That is, absent this

8 alleged conspiracy safer products would have been

9 introduced; a result of that would be the market would be

10 even smaller than it is today.

11 It is difficult for that to pass an economic logic

12 test. That is, if there would have been safer products,

13 quit rates would have gone down, probably initiation rates

14 would have gone up. We would have sold more.

15 I've done a lot of work with the soft drink industry.

16 There is a lot more soft drinks sold because there are diet

17 soft drinks that were introduced. So as a matter of

18 economic logic, the market would have been bigger if safer

19 products would have been -- bona fide safer products that

20 the Surgeon General said, yes, this is really a lot safer,

21 you should smoke this, or ostensibly, I suppose, it's

22 totally what I did is the latter. Suppose they had been

23 able to introduce a product that was totally safe in

24 pre-1964 that the people liked, but it was totally safe. We

25 know there is such a thing, it's called not smoking, but

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1 there isn't such a product. But suppose there was. They

2 got this breakthrough product. Then how much bigger would

3 sales have been?

4 The way I did this, there was studies done -- this is

5 cited in the Surgeon General's report of 1989, I think,

6 which analyzed what was the impact of all the bad

7 information that impacted the cigarette industry, beginning

8 with the Surgeon General's report. There is a lot of bad

9 information before that, as you know, but the Surgeon

10 General's report comes out in 1964 and says, this is it,

11 cigarettes cause lung cancer, essentially.

12 And then there's a lot of further bad information after

13 that, okay, counter-advertising that's required by the

14 federal government in the '70s, a lot of bad publicity. So

15 what this researcher did, Professor Warner, was he had

16 estimated how much sales were depressed in the industry as a

17 result of the bad information.

18 This number here, these here are actual per capita

19 consumption of cigarettes in the U.S., number of cigarettes

20 consumed per person in the U.S. going back to 1945.

21 So you see that it rose, and we have the Surgeon

22 General's report here, where we have a dip, we

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have a

23 significant dip there, and then sales come back for a while,

24 then they decline.

25 What Professor Warner did was said, suppose that

1 adverse information hadn't impacted the market. What would

2 sales have been? Okay. He estimated up through the

3 mid-1980s, and then I've just kept it flat at that point.

4 What that shows is that the bad information in the

5 marketplace about the effects of smoking on health shrunk

6 the industry by more than 50 percent.

7 So as an economist's analysis, to say what would happen

8 if there had been in the best of all worlds a totally safe

9 product introduced before 1964, so there is no Surgeon

10 General report because there's not going to be any unsafe

11 products on the market, probably very quickly, no bad

12 information, how big would the market be today, it would be

13 more than twice as large.

14 I've done this sort of analysis on soft drinks. The

15 soft drink market is much bigger because there is diet soft

16 drinks that are available that are acceptable

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and deemed

17 safe by the FDA.

18 Q. Now, this alternate projection done that you drew from

19 Professor Warner's work --

20 A. Yes.

21 Q. -- when Professor Warner did this, did he do this as an

22 econometric analysis or did he just pick out, just say as a

23 historian "I'm going to move curves"?

24 A. No. He did a lot of different analysis, econometric

25 analyses and other sorts of analyses, a cohort analyses,

1 looking at what would have happened, initiation rates and

2 quit rates.

3 Q. And is that a proper way to analyze different scenarios

4 where economic information is available?

5 A. Yes.

6 Q. Now, let me ask you this, and I don't mean to be

7 insulting to you as an economist, but did you really need

8 this kind of sophisticated analysis to conclude that there

9 was an incentive to market cigarettes that were accepted as

10 less hazardous?

11 A. It's very difficult to find a market situation where

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12 the introduction of a safer product didn't expand the

13 market: It was a product that people liked, and you provide

14 something that's safer than the alternative. If a diet

15 drink has less sugar, is less fattening, less fat, less

16 cholesterol, the market will expand. If you can produce

17 those products, they have consumer acceptance.

18 Q. Okay. Let me move now to another topic, doctor. Are

19 you familiar with the theory that one of the purposes of

20 this alleged conspiracy was to maintain the status quo and

21 prevent a so-called winner-take-all scenario?

22 A. Yes.

23 Q. As a matter of economics, just briefly, what do you

24 think about a conspiracy theory based on a winner-take-all

25 scenario as a matter of economics?

1 A. That makes no sense, as the winner-take-all scenario is

2 the view that if someone came out with this breakthrough

3 product everyone else would be gone, no one would be able to

4 compete. Very, very difficult to find a market like that,

5 where that's ever happened. There's been big breakthroughs

6 in every market you can think of; very, very few

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is there

7 one winner. Usually there's lots of winners. This has been

8 studied extensively in innovation. Often the first one is

9 not the winner, because the one that comes later says,

10 ah-hah, I saw what you did, I can figure out how to do

11 something better.

12 So there is a lot of research on that. Even when the

13 first one is the winner, there are always quick followers to

14 come up with products that are substitutes and that compete.

15 So there aren't any winner-take-all scenarios for

16 anything for a product like -- anything for a product like

17 this in history that I can think of. That is, someone comes

18 up with a safer product, the other companies would look;

19 well, this is how they did it, okay, we're going to do that,

20 and maybe do it a little bit differently, and we'll come out

21 with a product somewhat similar to that. If that's really

22 safer, and the Surgeon General says so and people like it,

23 we'll sell, too. And the market would be bigger.

24 So the winner-take-all scenario for this sort of market

25 situation simply makes no sense. This isn't a race like

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1 that where there is only one winner. This is a race in

2 which everybody is winners if they can do it, come up with a

3 safer product. We all gain, because the market will be

4 bigger.

5 Q. Now, let me ask you this: In connection with this, the

6 allegation of a conspiracy to maintain the status quo, did

7 you look at data on historic market shares?

8 MR. ADELMAN: Objection, Your Honor. No factual

9 basis.

10 THE COURT: Overruled.

11 Q. Do you remember the question?

12 A. Yes.

13 Q. Is that the answer to the question or --

14 A. I did look at data on market shares.

15 Q. Okay. Could you turn to tab 19, doctor? And again,

16 just in one sentence, can you describe that, and then I'll

17 display it, and then you can talk about it.

18 A. One of the most important measures economists use of

19 the competitiveness of the industry is look at how volatile

20 the market shares are, not look at the market shares at a

21 given date, but look over a period of time, how much

22 volatility, how much do shares go up and down, because

23 competition is all about market share fundamentally. That's

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24 what we focus on a lot in business schools.

25 Q. Does this document, 6166, deal with that very issue?

1 A. It does.

2 Q. Can you describe that --

3 A. Yes.

4 Q. -- to the jury? And as you go through, you know, just

5 point out some of the points of significance.

6 A. This is very difficult to read. It is a lot easier to

7 read here than there. I don't know whether you can see that

8 there.

9 Q. I'll tell you what. While you're pointing to a line

10 there, if someone needs to look up here, I'll mark it with a

11 laser pen.

12 A. These are the market shares of a company, if the

13 company has 25 percent market share say in 1974 and another

14 company has 10 percent, it is what the market shares of the

15 different companies are.

16 So the different companies have different colors. So

17 like the black line is American Tobacco. American Tobacco

18 doesn't exist anymore as a company. It was the biggest

19 company in the early 1950s, and had been for

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some time, a

20 big company, and had some of the biggest brands.

21 Now, what's interesting, if you look at American

22 Tobacco, the biggest company in 1950, doesn't exist

23 anymore. Okay. Its share declined pretty rapidly over

24 time, and it was eventually bought by Brown & Williamson and

25 essentially collapsed.

1 So you have the leader company in the industry ends up

2 disappearing.

3 You have other things going on, which is, as we know,

4 Philip Morris, which is the most successful cigarette

5 company in the U.S., its share going from -- Philip Morris,

6 which is the green line, Philip Morris going from one of the

7 smaller players to by far the biggest player in the U.S.

8 industry. Really remarkable change. Okay.

9 The other players are faring differently. We have

10 Liggett, which was much bigger than Philip Morris in 1950,

11 now hardly exists, won't exist much longer. Much too small,

12 much too uncompetitive.

13 Brown & Williamson, growing over time, significantly

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14 for several years, in fact, it's interesting, you see this

15 story is sort of Brown & Williamson devouring American

16 Tobacco. American Tobacco shares declining in about 1970,

17 Brown & Williamson's share equals American Tobacco, and it's

18 bigger than it after that.

19 So this is a lot of change for a consumer product like

20 food or tobacco or alcohol, you don't see this in virtually

21 any other market, this sort of change. It's a remarkable

22 change. Who is the biggest, who is the biggest competitor

23 in soft drinks is Coke. Who is the biggest competitor in

24 1950? Coke. Who is the biggest soap company? Procter &

25 Gamble. Who is the biggest beer brewer? Anheuser-Busch.

1 If you think about all the companies, they're not

2 always -- there are some of them, Kellogg's is the biggest

3 cereal company. It's not true for all of them, but they

4 don't disappear. You don't find the guy who was number one

5 in '50 no longer exists in hardly any industry.

6 It is really remarkable, the amount of market share

7 variation there is in this industry.

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8 Q. And the relevance of that, just briefly, to your

9 inquiry?

10 A. Remember, the alleged conspiracy said let's not do

11 anything, let's sit on our hands and pretend this didn't

12 happen, because if we do something things could get worse.

13 It is hard to imagine things getting worse for American

14 Tobacco than happened. It is hard to -- things turned out

15 well for Philip Morris, they didn't turn out very well for

16 anybody else. And they turned out poorly for everyone,

17 because they couldn't come up with what was truly a safer

18 product.

19 Q. Could you turn to tab 20, and ask you whether this was

20 another analysis you did to look behind this change in

21 market share.

22 A. Yes.

23 Q. This is Demonstrative 6174 A. And can you explain,

24 explain this briefly in general, and then deal with its

25 significance to the drop of market share of American

1 Tobacco?

2 A. Yes. To some extent, in some cases significant extent,

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3 the relative performance in fortunes of the companies depend

4 on how innovative they were on health. American Tobacco was

5 the leader, they said we've got our big brands that are not

6 filter brands, they were the big brands in the 1950s when

7 I'm growing up. They say, we're not putting filters on our

8 cigarettes because people -- filters were not popular for

9 quite a while. They stayed with nonfilters for a long time.

10 Q. This chart, doctor, it's a percent of sales per company

11 of filtered cigarettes.

12 A. Yes. I apologize for not introducing the chart.

13 This shows by company what percentage of their sales

14 were filters. So going back from 19 -- you may recall we

15 looked at the earlier chart for the whole industry, that the

16 whole industry very rapidly moved to filters.

17 This looks like individual companies, how fast they

18 moved to filters.

19 So this number here, this says that Brown & Williamson

20 in 1950 had by far the -- more of its sales in filters.

21 Viceroy was one of its big brands in 1950, and that was a

22 big seller, one of the big selling filters, one of the few

23 in the 1950s.

24 Q. What is the line on American, what's the significance

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25 of that to the opinions you're expressing here today?

1 A. Remember, American Tobacco in 1950, they were the big

2 company in the industry. They had the big brands, they were

3 nonfilter brands. They stuck with those brands and pushed

4 them. They sold still well for a long time.

5 They were very slow to move to filters, because they

6 had very successful nonfiltered brands.

7 What happened? Much, much slower than everyone else.

8 What happened? They lost very substantial shares, as we saw

9 before, and they never recovered.

10 On the other hand, Brown & Williamson had a head

11 start. They already had a good filter product out in the

12 marketplace, Viceroy. Their market share rapidly increased

13 in the '50s.

14 And Liggett, Liggett was, as Lorillard, was very active

15 in pushing filters, Kent. And their market share, if we

16 went back and looked, we would find their market share very

17 rapidly improved in the '50s.

18 In part, the relative success of the companies, and

19 actually what the primary determiner of the relative success

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20 in the '50s and '60s, was how fast they introduced tar,

21 lower tar filter products that people would actually buy.

22 Q. Now, let me again move to another topic for a few

23 minutes, doctor. There have been some allegations in this

24 case about attempts, claimed attempts by the defendants to

25 control and affect the information marketplace about smoking

1 and health. Are you generally familiar with those

2 allegations?

3 A. Yes.

4 Q. Did you as part of your analysis examine the question

5 of how it was that the tobacco companies generally

6 communicated on issues of smoking and health?

7 A. Yes.

8 THE COURT: Let me just ask, how much more do you

9 have?

10 MR. WEBER: I think I probably have 15, 20

11 minutes, Judge.

12 THE COURT: We'll take the lunch break at this

13 time.

14 The same rules apply. Don't talk about the case among

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15 yourselves or with anyone else. Don't form any opinions or

16 express any.

17 At 12:35 be back in the jury room. So we'll stand in

18 recess until that time.

19

20 - - - - -

21

22 (Luncheon recess taken.)

23

24

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1 THURSDAY AFTERNOON SESSION - MARCH 11, 1999

2 THE COURT: If the jury will be seated, I'll

3 tell the jury an out of school story. We used to try an

4 awful lot of cases and we had a decent jury room and we

5 had a jury room that had last been painted about the time

6 of William McKinley. And if the jurors were having

7 trouble reaching a decision, we always knew what jury room

8 to send them to.

9 That's not the reason we got the temperature so

10 cold in here, we are not trying to punish you, we are just

11 having trouble with the system. We'll try to do something

12 about that it. Mr. Weber.

13 MR. WEBER: Thank you, your Honor.

14 Q. Dr. Scheffman, when we broke for lunch I just asked

15 you a question about whether you had done some inquiry into

16 how it was, the manner in which the defendants communicated

17 with the public.

18 Do you remember that?

19 A. Yes.

20 Q. Have you, while you were at the FTC and otherwise in

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21 your professional life, done inquiries along that line of
22 inquiry and if so, what's the relevance?
23 A. Yes. Well the FTC is the federal agency that
24 regulates advertising and any commercial speech and other
25 things like advertising, and they enforce the laws with

4217
1 respect to that.
2 So part of the analysis you would look at in
3 analyzing whether an advertisement or other repetition was
4 deceptive, misleading or fraudulent, you would look at who
5 got the message, how did they get the message, what media
6 was it in, was it on TV or radio or print. Those were the
7 sort of things that you would look at.
8 Q. And did you look at how messages were communicated
9 here?
10 A. Yes.
11 Q. Messages on smoking and health?
12 A. Yes.
13 Q. And what did you find?
14 A. Well, what's interesting in the industry, the
15 industry certainly tried to communicate its views to the
16 public, but overwhelmingly not in advertising. There is
17 the frank statement you have heard about, and very few
18 advertisements by the industry directly to consumers.
19 What the industry did was speak to the media
20 and to the Congress. That is, they told their side of the
21 story to reporters, and the reporters told whatever the
22 story they thought was the right -- what they thought was
23 the right story.
24 That's very different from advertising. When
25 we analyze advertising, the FTC, the advertiser has a

4218
1 clean shot at the consumers. They have an advertisement,
2 they, the consumers, have a lot of other information. But
3 it doesn't go through the filter that they can put their
4 ad on. You see it on TV or read it in the newspaper or

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5 hear it on the radio.
6 The main communication in the industry in this
7 case went through the media. They put forward their view
8 to the media and Congress. And the media, the way the
9 public got the information was how it was written up in
10 the newspaper, what they heard on TV or radio, not in
11 terms of advertisements.
12 Q. Did you, based on the review you did, did you come to
13 a conclusion or an impression about the nature of the
14 media's coverage on smoking and health?
15 MR. ADELMAN: Objection. This is outside the
16 scope of his expertise.
17 THE COURT: I'll sustain it as to the form.
18 The form wasn't proper.
19 MR. WEBER: Let me ask, if I can ask it this
20 way.
21 You mentioned earlier one of the things you did
22 was look at the information environment right at the
23 beginning, do you remember that?
24 A. Yes.
25 Q. Did you reach a conclusion as to the nature of the

4219
1 information environment during the years you looked at
2 this?
3 MR. ADELMAN: Same objection, your Honor.
4 THE COURT: I'll sustain that. I think it's
5 beyond the scope of his background.
6 BY MR. WEBER:
7 Q. Now, let's move to another topic. Are you generally
8 familiar with the allegations that as part of the alleged
9 conspiracy the defendants misrepresented that the TIRC was
10 an independent institution, independent of the tobacco
11 companies, and that they did not disclose that TIRC had a
12 public relations function?
13 A. Yes.
14 Q. Did you analyze those allegations, using the
15 historical economic method you have described?
16 A. Yes.
17 Q. Now, let's go into that. And I want to first say, in

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18 the materials that you looked at, did you see any evidence
19 of the tobacco companies provided information to the United
20 States Department of Justice regarding the formation of the
21 TIRC?
22 MR. ADELMAN: Objection your Honor. This is
23 outside the scope of his expertise. He's here as an
24 economist.
25 THE COURT: Is this a foundation for --

4220
1 MR. WEBER: This is foundation as to directly.
2 THE COURT: I'll overrule upon the
3 representations of counsel that this is needed.
4 BY MR. WEBER:
5 Q. Did you find evidence of that?
6 A. Yes.
7 Q. Let me go to the Elmo for a moment.
8 Very old document. It's GK 300167.
9 Is this a letter to Mr. Hahn noted as Temporary
10 Chairman of TIRC. It's dated January 21, 1954 on the
11 letterhead of the Department of Justice from Assistant
12 Attorney General Barnes?
13 A. Yes.
14 Q. And again, without reading the whole letter, to just
15 move us along here to get to the point that we are going
16 to. Is this a letter in which the Assistant Attorney
17 General requested information about the TIRC?
18 A. Yes.
19 Q. And did Mr. Hahn respond to that?
20 A. Yes.
21 Q. And let me show you what's been marked as AIW 2442.
22 And ask if that's a letter from Mr. Hahn, Chairman of the
23 TIRC, to Stanley Barnes at the Justice Department?
24 MR. ADELMAN: Objection your Honor, same
25 grounds.

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1 THE COURT: I'll sustain that.
2 MR. WEBER: I'm sorry?
3 THE COURT: I sustained it.
4 BY MR. WEBER:
5 Q. Did you come across a statement of the origin and the
6 purpose of TIRC?
7 A. Yes.
8 Q. And was that of relevance to you in your

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analysis of
9 the purpose and origins of the TIRC?
10 MR. ADELMAN: Objection. Same grounds.
11 THE COURT: How's this relevant? How does he
12 have the expertise.
13 MR. WEBER: The allegations there were
14 misrepresentations made about the TIRC and its purpose in
15 these days. And that was part of this conspiracy.
16 Based upon his analysis he's going to say he's
17 seen, the purpose it was given to the Justice Department,
18 and it was inconsistency with the conspiracy of that
19 conduct.
20 MR. COUGHLIN: He's offered as an economist and
21 economist only, he's not a historical witness, not a
22 summary witness.
23 THE COURT: Why don't you try to deal with it
24 just on his opinions, and if you find you need to lay some
25 foundation because of the cross or otherwise, I'll

4222
1 reconsider it. But right now I think it's outside of the
2 scope of his report or expertise.
3 BY MR. WEBER:
4 Q. Did you reach an opinion, based upon the historical
5 review you did here, using the economic method, Dr.
6 Scheffman, as to whether or not the United States
7 Government was told by the members of the TIRC that one of
8 the purposes of TIRC was, in fact to, was in fact a public
9 information function?
10 MR. ADELMAN: Same question, same objection,
11 your Honor.
12 THE COURT: I don't know that he's the right
13 witness to deal with that.
14 MR. WEBER: Could I just be heard on that
15 briefly, judge? I don't want --
16 THE COURT: I don't know that he has personal
17 knowledge. And the document, if the document's admissible
18 it may be admissible on it's own. But I would like you to

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19 put a question to him that deals more on the economic
20 lines than the purpose or discussion between the
21 Department of Justice.
22 MR. WEBER: Let me see if I can do it this way.
23 Q. Did you look at the degree to which the TIRC had
24 communications with the Department of Justice to determine
25 whether that was consistent or inconsistent with the

4223
1 existence of a conspiracy of the type alleged here?
2 MR. ADELMAN: Same objection, your Honor.
3 THE COURT: I will sustain it again. I don't
4 think it's relevant. I don't know that he has the
5 expertise to deal with it.
6 MR. WEBER: Could I --
7 THE COURT: You can make a proffer, I mean
8 later, at a break or something, just save it for a proffer
9 and we'll keep the record complete.
10 MR. WEBER: My only point is this Dr. Jaffe was
11 an economist.
12 MR. COUGHLIN: Objection, your Honor.
13 THE COURT: If you want to offer the document
14 you can offer it and make argument if it's admitted, but I
15 think you can address the economic questions to him, even
16 if you have to put them in a hypothetical form that cover
17 the same ground.
18 BY MR. WEBER:
19 Q. Let me ask you this as a hypothetical question,
20 professor. From an economic standing, bringing the
21 expertise that you had from your experience at the FTC and
22 as a professor, from an economic standpoint, would it be
23 consistent or inconsistent with the existence of a
24 conspiracy that is alleged here if these companies, through
25 the TIRC, in 1954 wrote to the Department of Justice, told

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1 the Department of Justice that there was a TIRC, that it

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2 was going to be advised by lawyers, that it would not
3 engage in competitive research that might affect the
4 business, and that one of its functions related to giving
5 public information.
6 Would that, hypothetically if that occurred,
7 would that be consistent as an economic matter or
8 inconsistent with the existence of the alleged conspiracy?
9 MR. ADELMAN: Objection. Same grounds.
10 THE COURT: I'm going to overrule it as to the
11 form it's in now. Just go ahead and answer.
12 A. It would be inconsistent.
13 Q. And again, still dealing with it just briefly on a
14 hypothetical basis without going beyond the hypothetical,
15 explain why that would be inconsistent as an economic
16 matter to you?
17 A. The Department of Justice was the -- is the leading
18 anti-trust enforcement agency. They enforce the laws on
19 conspiracy. So if you were going to enter into a
20 conspiracy, you wouldn't disclose to the Department of
21 Justice what you were doing.
22 Q. Now, did you also look at the question as to whether
23 or not it was disclosed to the public that Hill & Knowlton
24 was advising the TIRC?
25 A. Yes.

4225
1 Q. And what did you find?
2 A. I found it was public knowledge that Hill and
3 Knowlton was the public relations operation for the TIRC
4 and the tobacco industry from the very beginning, from 1950
5 January 1954 onward.
6 Q. Could you turn to tab 27. And is that an example of
7 a publication relating to this issue?
8 A. Yes.
9 Q. This is Demonstrative -- or this is Exhibit AIW 3642
10 a quote from that?
11 MR. ADELMAN: Your Honor, objection leading.
12 THE COURT: It's not leading, so I'll overrule
13 it.

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14 BY MR. WEBER:
15 Q. Could you tell us what publication this came from?
16 A. This is Advertising Age, this is the leading media
17 publication in the country.
18 Q. And what is the significance of this information to
19 you appearing in Advertising Age?
20 A. Well, this communicates to the readers of Advertising
21 Age that Hill & Knowlton is the public relations of the
22 TIRC. And why it is important, Ads Age, in the industry is
23 communicating to reporters, they are not communicating to
24 the public. The vehicle by which they communicate to
25 reporters is Hill & Knowlton. That's a public relations

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1 company. It is their job to go to reporters and give them
2 the message.
3 It was no secret, no secret to anyone that Hill
4 & Knowlton was the public relations entity that was doing
5 the public relations function for the TIRC.
6 Q. Now, could you turn to the next tab 28 and just very
7 briefly state whether or not that's another article with
8 respect to that same topic?
9 A. Yeah, there were a number of articles that I found,
10 but this is business article in Business Week talking about
11 Hill & Knowlton being the public relations operation for
12 the TIRC.
13 Q. This is from AIW 3643. And what were the two points
14 referenced there?
15 A. Well, if we can read here that the scope of the
16 campaign required a big public relations concern and one
17 that didn't already have a title of some cigarette
18 interest. That's this entity was going to have a big
19 public relations funds in the handling of the American Iron
20 and Steel Institute.
21 They, Hill & Knowlton, had. Apparently they
22 thought that Business Week had done a good job of
23 representing other industries in getting the message to

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24 the media, and that was one of the reasons why they were
25 chosen.

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1 Q. Did you run across information in your economic
2 analysis to whether or not the Congress of the United
3 States was informed about Hill & Knowlton playing the
4 public relations role?
5 MR. ADELMAN: Objection, same grounds.
6 THE COURT: Overruled.
7 THE WITNESS: Yes.
8 Q. And just briefly describe the source for that, for
9 that conclusion?
10 A. There were very extensive Congressional hearings in
11 1957 on smoking and health. The Surgeon General testified,
12 Dr. Wynder testified, people with views of the industry
13 testified on whether smoking was a cause of lung caner and
14 other things.
15 As part of that hearing, and the transcript is
16 clear, that Congress knew that Hill & Knowlton was the
17 public relations operations, that TIRC had an active
18 public relations role, they were in fact the ones that
19 worked with Congress in arranging for witnesses to appear.
20 Q. Now, over time, did you run across evidence that the
21 PR role played by TIRC eventually changed?
22 A. Yes.
23 Q. Could you just briefly explain that?
24 A. In 1957, '58, the Tobacco Institute was created.
25 That was the trade -- official trade association of the

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1 cigarette industry.
2 And from that point on the Tobacco Institute,
3 the main role in doing the public relations, working with
4 Hill & Knowlton and providing public relations role for
5 the industry.
6 Q. Now, Dr. Scheffman, I want to move you now to the
7 last substantive topic that we have, and that deals with
8 one allegation we haven't dealt with.
9 Are you generally familiar with the

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allegation
10 in this case that the defendants did not advertise their
11 cigarettes aggressively enough on the basis of health
12 claims and that was this was part of the conspiracy?
13 A. Yes.
14 Q. And have you examined that issue using your economic
15 analysis and methodology as you earlier described it?
16 A. Yes.
17 Q. Let's go into it. And I think you told us earlier
18 you were familiar with FTC regulation of cigarette
19 advertising?
20 A. Yes.
21 Q. And did you participate in an historic analysis of
22 that very subject while you were at the FTC?
23 A. Yes. We did a study that was published, that was
24 released by the commission on the history of the FTC
25 regulation of advertising of cigarettes.

4229
1 Q. Now, the jury's already been informed on several
2 occasions about the existence of some cigarette advertising
3 guides that were published by the FTC in 1955. You are
4 familiar with those, aren't you?
5 A. Yes.
6 Q. Are those guides still in effect today?
7 A. Yes.
8 Q. What was the purpose of those guides, what was and
9 is?
10 A. The purpose of the guides was to stop -- there would
11 be a lot of health advertising leading up to 1955 about
12 coughs and throat and things like that. The FTC had
13 brought a number of cases in court, won all those cases by
14 the early 50s, 1955 issued guides that described what the
15 FTC policy was with respect to the health claims about
16 cigarettes.
17 Q. Now, have the guides themselves been changed or
18 modified since they were announced in 1955?
19 A. Their interpretation has changed.
20 Q. The text has remained the same, but there has been
21 some change in how it's interpreted?
22 A. Yes.

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23 Q. And what does that change in interpretation relate
24 to?
25 A. What happened was, in '55 the, the commission tried

4230
1 to --
2 Q. Professor, let me stop you there. This might help.
3 Could you turn to tab 29, I think.
4 Is that a summary of paragraph 2 from the
5 guides, or is that the language of paragraph 2 from the
6 guides?
7 A. Yes.
8 Q. That's from AS 378. Let me put that up.
9 And if you would, if I haven't interrupted you
10 too much, if you would continue describing how the
11 interpretation of the guides changed?
12 A. This is which? Okay.
13 What the guides, the essence of the what the
14 guides said is we'll view it a violation of the law if you
15 make claims related to health on cigarettes. This is in
16 1955, and this was after a battle that had been going on
17 15 years with the cigarette industry in which the FTC had
18 won court cases.
19 Now in 1960, what was permitted between '55 and
20 '60, the FTC didn't challenge blanketly claims about
21 filters, and claims about tar and nicotine. That was in
22 fact the 1957 Congressional hearings were all about that.
23 The companies are advertising filters, they are
24 advertising tar and nicotine. Why are they advertising
25 this? Are these products safer?

4231
1 In 1960 the commission said, in our view, it
2 would be a violation of the law if you make any claims
3 with respect to tar and nicotine at all.
4 So from that point on, there were no
5 advertising of tar and nicotine.
6 There came a time when the commission changed
7 its interpretation. The reason it changed it's
8 interpretation is the health care community and the
9 Surgeon General and others, and the Congress,

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told the FTC
10 in letters and meetings of the FTC, we think this is a
11 mistake, because tar and nicotine, because the health care
12 community was saying lower tar and nicotine is better. We
13 don't think smoking is good, but people should smoke lower
14 tar and nicotine if they smoke.
15 So in their view it was a mistake for the
16 commission to take this role. To take this view.
17 The commission, in 1967 said, because warning
18 labels were on cigarettes now, and that was as of 1964,
19 the Surgeon General's warning was put on cigarette
20 packages; that the commission would no longer view it a
21 violation; they could use tar and nicotine ratings, but
22 not make any health claims whatsoever, just disclose,
23 according to the FTC.
24 The FTC had its own lab. On the 7th floor
25 there was a lab that measured the tar and nicotine ratings

4232
1 of the cigarettes. And it was so tar and nicotine was
2 measured according to the FTC method, and said you can
3 disclose tar and nicotine according to the way we measured
4 it.
5 But you can't say in our view it would be a
6 violation of the law to say anything about that, whether
7 it is safe or anything, you can just disclose what the tar
8 and nicotine was.
9 And that was the last change in the
10 interpretations for the companies, and that's been
11 consistent up to today. In fact, the FTC in 1971, 1972,
12 ended up requiring the companies to disclose tar and
13 nicotine in ads, that's the reason why it's in the
14 advertisements.
15 It's required by the FTC and in agreement with
16 the FTC, and that's the commission policy since that time.
17 Companies that did disclose tar and nicotine can't make

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18 health claims, even claims implied. The consumer might
19 take away the impression this product is safer than
20 another product.
21 THE COURT: Why don't you wait until you get a
22 question.
23 BY MR. WEBER:
24 Q. Let me ask this. The last point you made about
25 prohibition on health claims, is that reflected in

4233
1 paragraph one of the health guides?
2 A. Yes.
3 Q. Let me just display that.
4 It says no representation claimed,
5 illustration, or combination thereof should be made or
6 used which directly or indirectly refers to either the
7 presence or absence of any physical effect or effects of
8 cigarette smoking in general, or the smoking of any brand
9 of cigarette.
10 Do you see that?
11 A. Yes.
12 Q. Let me ask you this question.
13 There has been a claim made earlier in this
14 case that the companies should have exploited health
15 concerns through their advertising, and there should have
16 been claims that one brand was safer than another.
17 Would those types of advertising claims be
18 consistent or inconsistent with the FTC's position?
19 A. Inconsistent. It's exactly what the FTC wanted to
20 stop in 1957, what the Congress wanted to stop.
21 Q. There was also a statement made earlier in this case
22 that it may in fact be evidence of conspiracy and
23 collusion, that the companies abided by followed, didn't
24 violate, the FTC guides. Have you ever heard in your years
25 of academic work or work at the FTC of a claim of

4234
1 conspiracy based on abiding by FTC positions?
2 MR. ADELMAN: Objection to the form of the
3 question.
4 THE COURT: Sustained.

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5 MR. ADELMAN: Thank you.
6 BY MR. WEBER:
7 Q. Based on your knowledge of FTC practice, and your
8 study of its history, has there ever been a claim that you
9 know of or an allegation of conspiracy for following what
10 the FTC says is the law?
11 MR. ADELMAN: Same objection.
12 THE COURT: Sustained.
13 BY MR. WEBER:
14 Q. Dr. Scheffman, let me ask you this.
15 Looking back on the past 45, 50 years of
16 history that you have been discussing. Would you say that
17 this industry, this group of defendants did or did not,
18 that's my question, did they or did they not face a
19 complex multi-dimensional challenge in the marketplace,
20 research, regulatory environment, public relations?
21 MR. ADELMAN: It's a leading question,
22 objection.
23 THE COURT: Sustained.
24 BY MR. WEBER:
25 Q. Could you describe the nature of the challenges

4235
1 facing this industry from the 50s on?
2 MR. ADELMAN: Move to strike, your Honor.
3 THE COURT: Overruled.
4 A. I've studied, you know, hundreds of industries. The
5 cigarette industry is unique in the challenges it faced.
6 The cigarette companies of the 1950's were selling a
7 product that was always legal, always allowed by the
8 government to be sold, but which, by the later 1950's, was
9 widely agreed caused health, serious health problems.
10 And that's very, very difficult situation to
11 deal with, if you are selling a product that is lawful,
12 that causes health problems, there isn't any industry I
13 can think of that has ever faced the challenges of the
14 cigarette industry.
15 Q. And understanding that background and history. Do
16 you think that a theory of conspiracy explains the conduct

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17 of these companies over those years?
18 MR. ADELMAN: Objection. Vague, irrelevant.
19 THE COURT: Overruled.
20 THE WITNESS: No. Again, the conspiracy here
21 is alleged to have -- that it would have been entirely
22 different but for that the companies didn't compete. The
23 companies in fact did compete, that's why we have the
24 products in the marketplace, that's why tar and nicotine
25 fell. That's why we have what we have, which is still no

4236
1 safe cigarette; there isn't such a thing. But we have
2 whatever is possible according to human knowledge at this
3 point.
4 Q. Okay.
5 MR. WEBER: That's all I have, your Honor.
6 Thank you very much.
7 THE COURT: Mr. Adelman.
8 CROSS EXAMINATION
9 BY MR. ADELMAN:
10 Q. Doctor, let's begin, and briefly, on the subject of
11 the FTC, where you worked for some ten years, is that
12 correct?
13 A. Correct.
14 Q. And if you just concluded your testimony on direct by
15 talking about the FTC advertising guides, correct?
16 A. Correct.
17 Q. And they are guides, aren't they?
18 A. There are statements of what the FTC thinks the law
19 is and what it's likely to do.
20 Q. But they are voluntary on the part of the cigarette
21 companies, correct?
22 A. It has nothing to do with voluntary.
23 Q. The cigarette companies themselves can agree or not
24 agree, or follow or not follow these guides as they see
25 fit. They are not laws as such, correct?

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1 A. The companies could choose to be sued by the FTC,
2 which they had been before that time.
3 Q. But they are voluntary, aren't they?
4 A. I don't understand that term, it's not --
5 Q. You don't understand it?
6 A. I think you are confusing some other

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guides.
7 Q. All right.
8 Now, also, based on your experience at the FTC,
9 you would agree that the FTC under these guides, under any
10 form, would approve and would be receptive to honest
11 statements about health in connection with cigarettes,
12 wouldn't they?
13 A. No.
14 Q. Oh, they wouldn't? Did you hear my question?
15 A. Yes, I did.
16 Q. Okay, your answer is that even if honest statements,
17 determined to be honest by that agency, were presented,
18 they wouldn't approve it.
19 Is that the idea?
20 A. Let me tell you the history in --
21 Q. No, sir, if you will.
22 A. I can only answer the question. I can give you an
23 example explaining exactly why that's not true.
24 Q. My question is, you can give any explanation you
25 want, but answer my question, if you will.

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1 If someone or some company came with honest
2 statements about cigarette smoking, those statements would
3 be permitted, wouldn't they?
4 A. Well, no. The problem is, you are making something
5 extremely complicated very simple. What is honest, that is
6 if a company had something that the Surgeon General and the
7 FDA said this is a safer product, might they be able to
8 claim that, well, the FTC might consider it in that case,
9 okay, but most, at most, would consider it --
10 Q. But they would consider it and approve it, wouldn't
11 they?
12 A. Mr. Adelman, the whole history of the guides was that
13 the FTC, everyone in the world thought the cigarette
14 companies shouldn't be making health claims.
15 You go back and look at the history of the
16 early 50s. The 1957 hearings were all about why are these
17 guys making claims about filters? Is this a good idea?
18 And a lot of people said it's not a good idea,

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19 and the commission policy has been, since 1955, it's not a
20 good idea for the cigarette companies to be making health
21 claims. Where people should get their information on
22 health is from the Surgeon General and the government and
23 the medical community.
24 Q. In 1955 there was a concern that these statements
25 about health had elements of untruth, correct? That was

4239
1 one of the concerns, wasn't it?
2 A. I don't -- untruth is too simple. It's whether
3 people would be led to believe that a product really was
4 safer.
5 Okay. That raises lots of problems.
6 One, is it safer?
7 Two, would people start smoking, not stop
8 smoking, or not start quitting because it was safer?
9 It's a very complex issue.
10 Q. That's your answer?
11 A. Yes.
12 Q. Let me turn to a topic which you based most of your
13 testimony on, which was talking about the marketing and so
14 forth of cigarettes in other countries.
15 First of all, besides the data that's reflected
16 on your chart, what other independent research did you do
17 with respect to the marketing of cigarettes in the 26
18 countries listed on that chart?
19 A. I familiarized myself with some things about the
20 regulatory environment in various other countries.
21 Q. Each country?
22 A. Not in every country on the chart, no.
23 Q. How many?
24 A. I know something about UK and Germany and France and
25 Italy, and a number of the other countries, Scandinavia.

4240
1 Q. But you didn't familiarize yourself, as you say, with
2 the regulatory environments in each of those countries
3 listed on that chart, did you?
4 A. No.
5 Q. And when you say familiarize yourself, I take it you

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6 mean you read something about them?
7 A. Yes.
8 Q. Did you interview any public officials from any of
9 those countries?
10 A. Oh I looked at the statements by authorities about
11 what the regulatory region was and what it's effects were.
12 Q. May I ask the question again.
13 Did you interview any public officials from
14 those countries about the regulatory policies and
15 practices there?
16 A. No.
17 Q. Did you conduct any surveys in any of those countries
18 yourself, sir?
19 A. No.
20 Q. Did you get any data, if you will, from public
21 agencies in those countries?
22 A. I got data, I have data information, that's directly
23 relevant to this which is what? The data on the price of
24 cigarettes in this country.
25 Q. Did you go in any of these countries and speak to

4241
1 people in the public health community and the anti-smoking
2 community.
3 Did you do that, sir?
4 A. I read stories about it, but I didn't talk to anyone.
5 Q. You didn't talk to anybody, did you?
6 A. No.
7 Q. All right. And you would agree, I hope, that the
8 countries you have listed there span the globe, correct?
9 A. No. They were deliberately chosen to be, to be major
10 western developed economies.
11 Q. Pardon the metaphor. Okay, you start with England,
12 you go to France, you go to Italy, then to New Zealand,
13 Japan?
14 A. Yes, not just western Japan, yes.
15 Q. What you are telling us, I think, in your testimony,
16 to be fair, you didn't go into what they used to call the
17 socialist countries?
18 A. I didn't report those data.
19 Q. Did you consider China, by the way?
20 A. Yes.
21 Q. In your --
22 A. No, not -- I know the data on China, but

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that was not
23 part of the analysis.
24 Q. And you would agree that those 26 or so countries
25 listed there each have different cultural histories?

4242
1 A. There is difference in culture.
2 Q. Significant from Canada to Australia to Japan to
3 Italy, Denmark?
4 A. There are cultural differences.
5 Q. Did you explore any of those in terms of smoking
6 habits in those countries?
7 A. I did consider the issue where comparisons of
8 prevalence were reasonable, given that there were cultural
9 differences, and there were differences in regulatory
10 regimes, yes.
11 Q. With respect to what countries?
12 A. All the countries.
13 Q. And by what means did you do that?
14 A. I did that in that I familiarized myself with the
15 regulatory structure. And I know as an economist the most
16 important determinant of the amount of smoking is the price
17 of cigarettes.
18 And the US has the lowest price of cigarettes
19 practically anywhere in the world of the developing
20 countries, because we have a lower tax rate than most
21 other. It's well known in the health community the main
22 way to reduce smoking of legal products is to raise the
23 tax and raise the price.
24 The problem is, you get people buying roll your
25 own products, which in some countries, in England now is

4243
1 50 percent of the consumption. So I looked at the price,
2 so I did culture and everything else, but what's very
3 interesting about that comparison is that the US ranked
4 well within the ballpark with everyone. We have the best
5 price. All things being equal, our prevalence should be a
6 lot higher; it is not.
7 Q. Finished?
8 A. Yes.

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9 Q. Let me ask you again. Did you look at the cultural
10 differences among the people in those countries not
11 economics, but culture; how people behave and their
12 history. Did you look at that?
13 A. I considered that in a way a economist would consider
14 it.
15 Q. And you just gave your explanation of how a economist
16 would do it?
17 A. Yes.
18 Q. Turn that around. You didn't consider the culture
19 differences in any other way than your economic analysis?
20 A. Not different from what I just described.
21 Q. Did you determine in detail, or make any inquiry into
22 the Research and Development and marketing budgets of the
23 various companies that sold cigarettes in all these
24 countries?
25 A. No.

4244
1 Q. Tell the jury what the three top brands are in New
2 Zealand?
3 A. I don't know.
4 Q. Tell the jury what the three top brands are in
5 Ireland?
6 A. I don't know.
7 Q. Tell them what the three top brands are in Greece?
8 A. I don't know.
9 Q. Do you think you did a thorough survey, sir?
10 A. Yes.
11 Q. Do you know the three top brands in Italy?
12 A. No.
13 Q. Can you name three cigarette companies in Italy, the
14 kind of cigarettes?
15 A. No.
16 Q. What kind of survey did you do?
17 A. Well, Mr. Adelman, I didn't do a survey, I did an
18 economic analysis. And I looked at data on prevalence, and
19 I considered, as an economist would consider, are those
20 comparisons meaningful? That is, there are cultural
21 differences, there are regulatory differences, there are
22 differences in price.
23 So it is my conclusion that the US is

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24 certainly, at a minimum, not an outlyer, that's a valid
25 conclusion. My conclusion was yes, that was a valid

4245
1 conclusion.
2 Q. Did you determine, in your so-called economic
3 analysis, whether any of the cigarette companies in those
4 countries themselves were conspiring? Did you look at
5 that?
6 A. Yes. Actually, yes.
7 Q. All right. Which cigarette companies did you look at
8 in specifics?
9 A. What's interesting, in Germany, the companies for
10 a long time went into voluntary agreements -- it's not
11 clear whether it was with the government or not, but it was
12 well known -- to reduce tar and nicotine levels, of their
13 products.
14 Q. That's the conspiracy you are talking about?
15 A. That would be, you know, it's a joint activity.
16 Q. How about the other 26 countries? Did you determine
17 whether any of those countries have cigarette companies
18 that are conspiring?
19 A. In the UK, the government, the government leaned on
20 the companies to work together to reduce tar and nicotine
21 levels.
22 Q. All right.
23 Any other countries you determined whether or
24 not the countries there were conspiring?
25 A. I didn't. I found evidence, that of joint activity.

4246
1 I didn't say any of these were conspiracies, I said they
2 were joint activity, generally for the purpose of reducing
3 tar and nicotine levels. Those are the examples I know of.
4 Q. Now, you would agree with me, that the US tobacco
5 companies, the defendants here, sell their products
6 overseas, don't they?
7 A. Yes.
8 Q. In fact, they are the leading cigarette companies in

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9 the world, aren't they?
10 A. Well, Philip Morris is the largest cigarette company
11 in the world.
12 Q. They lead the way, so to speak, correct?
13 A. Well, that's not, it's the biggest cigarette company
14 in the world. That doesn't mean they are the biggest
15 cigarette company in Greece, which they are not, or Italy.
16 They are the biggest in the world. They are by far the
17 biggest in the US, and they have significant sales in a
18 number of other countries.
19 Q. Did you do any studies to determine whether any of
20 the cigarette companies overseas followed the patterns and
21 practices of these defendant cigarette companies.
22 Did you do that?
23 A. With respect to what sort of pattern?
24 Q. Patterns and practices?
25 A. Yes, yes. Companies, when they are permitted,

4247
1 advertise.
2 Q. Is that all?
3 A. Companies have not, in most places in the world, have
4 not -- as best we can tell, most companies have not
5 everywhere in the world, have not necessarily agreed on
6 causality as the US -- similar to the US companies.
7 Q. Is that it?
8 A. Yes.
9 Q. Do you know what ICOSI is?
10 A. If I recall right, its an international organization
11 or trade group sort of thing that is related to the tobacco
12 industry.
13 Q. It's international, correct?
14 A. Yes.
15 Q. And some of the American companies, defendants here,
16 are members of the ICOSI?
17 A. I think that's right.
18 Q. Philip Morris?
19 A. I believe they are.
20 Q. RJR?
21 A. I believe so.
22 Q. May I have Exhibit 1986.
23 It is a document styled Social Costs, Social
24 Values, Geo Berman, Zurich. May 1979.
25 Have you ever seen this before?

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1 A. Yes.
2 Q. What is it?
3 A. I have seen it before. You would have to show me the
4 document.
5 Q. Well, move ahead, please.
6 Now, do you recognize the documents? This is
7 an ICOSI document?
8 A. Yes.
9 Q. Do you agree with that?
10 A. Yes.
11 Q. And you have read it before?
12 A. Yes.
13 Q. And it says, "Our strategy is to attack the concepts
14 of social cost analysis. We have found that these concepts
15 are most vulnerable. If we can undermine the concepts then
16 we do not have to enter into public debate over scientific
17 numbers --"
18 THE COURT: Specific numbers.
19 Q. I'm sorry. "Our attack consists of four major
20 themes. "These social concepts are bad economics. They do
21 not fit into a philosophy of personal freedom and civil
22 liberty. Smoking benefits society and its members in many
23 complex ways. And, Anti-smoking programs and groups are
24 harmful to our society."
25 Have you read that before?

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1 A. Yes.
2 Q. This is an organization, international organization
3 to which Philip Morris and RJR belongs, correct?
4 A. Yes.
5 Q. And the purpose of this, among other things, is to
6 attack the anti-smoking programs and groups, correct?
7 A. ICOSI is an organization of companies in different
8 countries that do what they are going to do. ICOSI doesn't
9 come to the US and do anything.
10 Q. Where, overseas?
11 A. It doesn't go in any country in Europe. The
12 companies in the different countries do whatever they are
13 going to do.
14 Q. Including Philip Morris and RJR, correct?
15 A. Whatever they choose to do.
16 Q. All right. May we have Exhibit 2044, please.

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17 Have you seen this before?
18 A. I can't read it, I'm sorry. Do you have a hard copy
19 to show me?
20 Q. I think we do.
21 Doctor, if I may?
22 A. I think I've seen this, yes.
23 Q. All right. Can you identify it?
24 A. All I know is this was a meeting apparently in
25 Scottsdale, 1979, and it talks about -- I don't -- I don't

4250

1 even remember who created this document, what entity it is.
2 Q. Who was meeting in Scottsdale?
3 A. I would have to go back and look and see if the
4 document describes it. Okay. I don't remember. The
5 document doesn't say. I don't remember if there was any
6 testimony about --
7 Q. Well, this is an ICOSI document, isn't it?
8 A. I don't know that it is. But I don't know.
9 Q. We have highlighted a part there that might help you
10 there?
11 A. Highlighted where?
12 Q. Right there?
13 A. Yes. I didn't see the ICOSI. Yes.
14 Q. Now, we can agree it's an ICOSI document?
15 A. Yes.
16 Q. Move to the next highlighted portion.
17 And here under series of goals is discrediting
18 the antis. The and antis are, of course, the anti-smoking
19 movement?
20 A. I think that's right.
21 Q. And it says, develop for dissemination profiles,
22 conflicting statements, examples of intolerance, et cetera?
23 A. Yes.
24 Q. That's an attack position set out in the ICOSI
25 document, isn't it?

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1 A. I don't know what an attack position is. It does
2 talk about -- I don't know what was done. It does talk
3 about discrediting the antis in the same way the antis do
4 everything they can do to discredit the tobacco companies.
5 Q. I see. All right.
6 Now, you testified earlier, in fact this

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7 afternoon, when the TIRC, later to become TI, was
8 formulated, there was a presentation to Congress by
9 representatives of the tobacco industry?
10 A. It's not true. TIRC never became TI, they were
11 always separate entities.
12 Q. But there was a presentation?
13 A. I'm sorry, you'll have to ask it again.
14 Q. I was trying to refer you back to your prior
15 testimony today about a presentation to Congress back in
16 the 1950s?
17 A. There was testimony.
18 Q. Yes. By who whom?
19 A. Before the Congress.
20 Q. By?
21 A. In 1957 by Dr. Little, who was the Scientific
22 Director of the Scientific Advisory Board.
23 Q. Of?
24 A. Of the TIRC.
25 Q. Were there other tobacco officials who testified at

4252
1 that time?
2 A. There were tobacco, if I recall right, there were
3 tobacco company people that testified.
4 Q. And you are able to tell us that because you studied
5 the record of that proceeding?
6 A. Yes.
7 Q. Can you tell the jury whether anybody speaking on
8 behalf of the tobacco company told them about the
9 gentlemen's agreement?
10 A. I don't know that. I don't know any evidence that
11 there was a gentlemen's agreement in 1957, if there ever
12 was one.
13 Q. My question stands, did anybody at that time, on
14 behalf of the tobacco industry, tell the Congress about the
15 gentlemen's agreement?
16 A. What the industry made clear is that they were, that
17 the industry had a -- the members of the industry had a
18 position on causality and they disagreed with the Surgeon
19 General who testified in that hearing that he viewed that
20 the causality was likely. So it's clear that the industry,
21 the members of the companies and the industry had a common

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22 position on causality. That's --
23 Q. I put it to you again. From your study of the
24 record, did anybody from the tobacco industry tell the
25 Congress at that time about the gentlemen's agreement?

4253
1 A. The gentlemen's agreement?
2 Q. Yes, sir?
3 A. I don't know that there ever was a gentlemen's
4 agreement.
5 THE COURT: It's kind of a yes or no.
6 THE WITNESS: I sorry.
7 THE COURT: Yes, no, or I don't know.
8 THE WITNESS: Did they testify as to the
9 presence of a gentlemen's agreement? No.
10 MR. ADELMAN: Thank you. That's all I have.
11 THE COURT: Do you have any redirect.
12 MR. WEBER: Judge, can I approach just quickly.
13 (The following discussion was conducted at the
14 side bar between court and counsel, out of the hearing of
15 the jurors, as follows:)
16 MR. WEBER: The only issue I have is he relates
17 to -- that document is the statement of stated origin of
18 purpose of the TIRC in 1954. That deals with its, the
19 institution's background, et cetera.
20 I will have no further questions for the doctor
21 if Mr. Coughlin agrees we just put that document in the
22 record. It's an ancient document, there is no question
23 about its authenticity. They have now raised the issue.
24 THE COURT: I don't understand. He doesn't
25 know what it is anyways, but do you object in terms of the

4254
1 admission of that document?
2 MR. COUGHLIN: And this is the document, this
3 is the letter to the Department of Justice or the letter
4 back?
5 MR. WEBER: I don't --
6 THE COURT: It would be kind of like the

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7 articles of incorporation.
8 MR. WEBER: It's a statement of the origin and
9 purpose.
10 MR. COUGHLIN: He can put it in as long as he
11 doesn't ask anymore questions.
12 MR. WEBER: Okay. Then we are done.
13 (The following proceedings were conducted in
14 open court.)
15 THE COURT: Thank you. You can step down and
16 I'll call upon Mr. Weber if he wishes to make interim
17 argument, which is not evidence but an opportunity of the
18 parties to comment on the evidence.
19 Mr. Weber.
20 MR. WEBER: Thank you, your Honor, ladies and
21 gentlemen.
22 I've had a couple opportunities to speak with
23 you in the course of our few weeks together, and I've
24 tried to mention the theories eventually run into facts.
25 That's the way we separate them. Theories eventually run

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1 into facts. They can run into real experience, they run
2 into real expertise, and it just happened here.
3 This is not a wanna-be conspiracy theory, this
4 is a man who worked at the Federal Trade Commission, a man
5 who has had high positions in academics, who has written
6 about conspiracies, who has done economic analyses, who's
7 done it in the real world. He's analyzed positions in our
8 government about whether or not conspiracy theories made
9 sense with economic fact. And the reality you just heard,
10 the conspiracy theory doesn't fit with fact, it never did.
11 We heard that there should be safe cigarettes.
12 We don't know what they are, but they ought to be there.
13 He addressed how there are none anywhere in the world,
14 whether people are in this alleged conspiracy or not.
15 He looked at people who ought to be smoking.
16 He looked at real world data with people around the rest

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17 of the world, it said we should have exploited health
18 concerns in our ads that cigarettes are safer. That's in
19 evidence.
20 The conspiracy theory does not only not fit the
21 facts, it's not even in the same ballpark with the facts.
22 Thank you.
23 THE COURT: Mr. Adelman.
24 MR. ADELMAN: Shortly now you are going to have
25 an opportunity to decide this case. My remarks, I hope,

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1 will stay with you at that point.
2 This gentleman talked about -- the conspiracy
3 he talked about, is not this case. And you will find out
4 from the judge what the conspiracy is all about.
5 It's very easy to set up a straw man and then
6 talk about it, and that's what we do in the case of this
7 witness here, Dr. Scheffman, when you look carefully
8 listen carefully to what the judge says of what you are to
9 decide.
10 What did he offer?
11 Well, international information. Sounded good.
12 Big charts. Looked good. Color, good graphics, good
13 video. What do we find out? He doesn't know much. He
14 can't even tell you who the leading cigarette companies
15 are in all the various companies. He can't tell you what
16 it means to this particular case.
17 The information offered here, I suggest to you,
18 is a diversion, a diversion from what reality is in the
19 documents, as they say.
20 This man testified. Did they offer any
21 evidence from him about all the documents, from all of
22 these companies that you have seen?
23 No, no. That's the proof, that's the proof of
24 the conspiracy. It's the proof of the collusion.
25 Sure, he can get up and talk about

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1 international things, whether it means anything

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to this
2 case or not. He can talk about it and it
doesn't.
3 So, ladies and gentlemen, the bottom
line is,
4 they're afraid what the evidence we have
offered shows,
5 they're afraid what these documents speak of.
6 Gentlemen's agreement, he stumbled
on that last
7 question. That's the critical point where they
are
8 forthcoming with the Congress? No, when you
get a chance,
9 and you will, when you look at all these
documents you
10 will see clearly the pattern of deception,
11 misrepresentation and suppression, which forms
the
12 conspiracy charged in this case.
13 THE COURT: Thank you Mr. Adelman.
14 MR. ADELMAN: Thank you, your Honor.
15 THE COURT: Would the defendant call
your next
16 witness?
17 MR. WEBER: Our next witness is Dr.
Wecker, and
18 I've got to go check. That cross was a little
shorter
19 than I thought. So I have to run out.
20 THE COURT: If the jury wants to get
up and
21 stretch, you are welcome to.
22 If the jury wants to go back in the
jury room,
23 it will take just a few minutes.
24 (Brief recess.)
25 MR. WITHEY: Your Honor, we wanted
to alert the

4258
1 court to what the nature of our objection is
going to
2 be --
3 THE COURT: I read your material.
4 MR. WITHEY: -- to Dr. Wecker's
testimony.
5 First of all, we received this
morning a stack
6 of reliance documents that were never
identified. But
7 Mr. Biersteker has been kind enough to say he
won't use
8 these in his direct exam with one exception
being the
9 question CPS 2. We object to anything he has
not
10 previously designated.
11 There are three objections we have.
First of
12 all, as to his qualifications, this man has
testified in
13 four occasions on his deposition he will not

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testify about
14 causation in any way, shape or form, essentially. And we
15 also don't believe he is an expert in either epidemiology
16 or any of the other attributable risk formulas, the other
17 subject matter of the testimony he's been proffered for.
18 Secondly, we are going to object, because none
19 of -- the extent to which the opinions were not expressed
20 in any of the two reports that the court has allowed
21 questions on.
22 And the third objection is going to be, it is
23 not proper rebuttal. I don't necessarily need to have a
24 prewitness ruling because you have allowed this witness to
25 testify, but I can just let the court know we are going to

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1 be objecting to many of the questions on the grounds of
2 lack of qualifications. He's not a medical doctor, not
3 health care economist, he's never published in any of the
4 literature. He's a professor in statistics and his
5 reports you have read are very circumscribed in terms of
6 what they attempt to rebut.
7 They are going to offer him on the Surgeon
8 General's consumption chart. He never referred to it in
9 his report. He's never addressed the topic in any of his
10 reports.
11 I don't know exactly what they are going to ask
12 him about other than what I seen in the exhibits they
13 provided. All of the exhibits they provided are riskier
14 lifestyle issues, all of which involve causation,
15 confounding variables, all of which involve whether the
16 relative risk would change if they were taken into
17 consideration.
18 So at least from what I've seen, in terms of
19 what they have given us, I don't see there is much that
20 this witness is going to be able to testify to.
21 I wanted to alert the court before

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his
22 testimony.
23 THE COURT: Okay. I did go back through
24 Harris's, read all his testimony again.
25 Just an observation, I thought his testimony

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1 was awfully narrow on matters that overlapped with
2 Wecker's report. And, you know, I'm not guessing what
3 questions you will ask, but I thought his questions were
4 awfully narrowly drawn.
5 Maybe the parties can inform me, but I was
6 looking at 2410 is the first reference, 2411, 2421, 2444.
7 I thought those were the only ones that really got into
8 areas that Wecker would deal with.
9 MR. BIERSTEKER: Well, the bulk of his
10 testimony is going to be directed to the 420,000 deaths
11 calculation, and he will approach it from the statistics
12 standpoint.
13 Mr. Withey mentioned there were some exhibits
14 that were designated that hadn't been included in his
15 reliance materials. But there are correspondence among
16 the parties that would not be a basis for objection, with
17 respect to witnesses, generally it was not special
18 correspondence.
19 With regard to Mr. Wecker, and maybe counsel
20 was not aware of it, but there is such correspondence.
21 And I think his testimony is four square within his
22 report, four square responsive to the evidence that the
23 plaintiffs have put in, and will be within the scope his
24 expertise.
25 For example, Mr. Withey talked about risk

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1 factors. By that Dr. Wecker means nothing more than facts
2 that are associated with the mortalities based upon
3 statistical analysis, statistical works, nothing more. He
4 is not going to be speaking as Ph.D doctor.

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5 THE COURT: I don't think there is going to be
6 a problem. If one arises, an objection is made, we should
7 take it up at that time.
8 MR. WITHEY: The 420,000 was never referred to
9 in the reports.
10 (Discussion off the record.)
11 (The jury was returned to the courtroom and the
12 following proceedings were conducted in open court:)
13 THE COURT: If the jury will retake your seat,
14 I'll call upon the defendants to call your next witness.
15 MR. BIERSTEKER: William Wecker, your Honor.
16 WILLIAM WECKER
17 called as a witness by and on behalf of the Defendant,
18 being first duly sworn, was examined and testified as
19 follows:
20 THE COURT: Please take a seat and state your
21 name and spell your last name for the court reporter.
22 THE WITNESS: I'm William Wecker W-E-C-K-E-R.
23 THE COURT: Mr. Biersticker.
24 MR. BIERSTEKER: Thank you, your Honor.
25 DIRECT EXAMINATION

4262
1 BY MR. BIERSTEKER:
2 Q. Good afternoon, Dr. Wecker.
3 Good afternoon ladies and gentlemen.
4 Dr. Wecker, where do you live?
5 A. I live in [DELETED]. Can you hear me?
6 Q. Now I can.
7 A. [DELETED], it is a small town near [DELETED]
8
9 Q. I understand you have been under the weather today.
10 You are not alone.
11 You are a statistician by training and
12 profession, is that correct?
13 A. Yes.
14 Q. You are not a medical doctor, are you?
15 A. No.
16 Q. You are not here to provide any opinions as a medical
17 doctor, correct?
18 A. That's correct.
19 Q. You are here to speak to opinions that you would hold
20 as a statistician?

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21 A. Correct.
22 Q. Before we get to those opinions, doctor, I would like
23 the jury to hear a little bit about your education and
24 experience.
25 Would you please describe your college and

4263
1 post-graduate education?
2 A. I have a Bachelor of Science degree in basic sciences
3 from the United States Air Force Academy, and that was in
4 1963. And then in about 1970 I returned as a civilian to
5 the University of Michigan and got the Master of Science
6 and Ph.D. degree. And that's the end of education.
7 Q. After you graduated from Air Force Academy in 1963,
8 did you serve in the armed forces?
9 A. Yes. I flew airplanes for the Air Force.
10 Q. Did you fly in combat?
11 A. Yes.
12 Q. How many missions did you fly?
13 A. More than a hundred. I've forgotten exactly.
14 Q. Were you awarded the Distinguished Flying Cross?
15 A. Yes.
16 Q. After obtaining your doctorate degree in the early
17 1970s, what did you do?
18 A. I went to the University of Chicago as a professor
19 and taught statistics and did research in statistics.
20 Q. How long did you stay at the University of Chicago?
21 A. I could look it up, it's about 12 or 13 years.
22 Q. After you left the University of Chicago, what did
23 you do?
24 A. I went to the University of California at Davis doing
25 the same sort of job.

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1 Q. And after the University of California Davis?
2 A. In 1990 I left full time university employment and
3 started a consulting company.
4 Q. You said you left full time university employment.
5 Did you continue to teach?
6 A. I still teach from time to time at Stanford
7 University, but not full time anymore. My main

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time is
8 spent running the consulting company.
9 Q. Do you have any editorial responsibilities with
10 respect to peer review journals in the field of statistics?
11 A. Yes. I've been on the editorial board of the Journal
12 of the American Statistical Association and also the
13 Journal of Business and Economic Statistics. I still do
14 that work today, and started in about 1977. So I've been
15 on the editorial board for a number of years.
16 Q. Dr. Wecker have you ever been called upon to be an
17 advisor or consultant to the United States Government?
18 A. Yes.
19 Q. Would you explain what your role was?
20 A. I was asked to be a part of a government committee on
21 environmental matters where I studied, along with others,
22 and participated in hearings having to do with the effects
23 of lead on human health. The element lead like in fish
24 sinkers, if you eat enough it will kill you, and if you eat
25 a little bit it will damage you. So we examined that as a

4265
1 health issue and made recommendations.
2 Q. What does statistics have to do with that issue?
3 A. At least two things; first, it's a way to figure out
4 where there is lead, so you at least know where the
5 problems are; and also, it's used to assess the effects of
6 lead on human health.
7 Q. Doctor, there had been statements made by experts for
8 the plaintiffs during the course of this trial that
9 cigarette smoking causes 400,000 or 400,000 plus deaths
10 each year.
11 Based on your training and education and
12 experience and the work that you have done, do you have an
13 opinion, to a reasonable degree of scientific certainty,
14 as to whether or not that statement is correct?
15 A. Yes, I do.
16 Q. Can you tell me, to a reasonable degree of scientific
17 certainty, whether that figure, 400,000 deaths,

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is a
18 reliable one?
19 MR. WITHEY: Objection. Lack of foundation,
20 and not in the report, your Honor.
21 THE COURT: Overruled.
22 THE WITNESS: You asked. If I could tell
23 you --
24 THE COURT: Go ahead and answer it.
25 THE WITNESS: I'm not sure if you want a yes or

4266
1 no or if you want the answer.
2 THE COURT: I think he wants an answer.
3 BY MR. BIERSTEKER:
4 Q. Is it a reliable statement?
5 A. It is not.
6 Q. Are you familiar with the data upon which the 400,000
7 death figure is based?
8 A. Yes, I am.
9 Q. Are you familiar with how the calculation is done?
10 A. Yes.
11 Q. Dr. Wecker, please tell the jury what data source was
12 used to derive the estimate of the 400,000 deaths?
13 A. It's a data source called CPS2, standing for -- or
14 sometimes ACS2, for a study done by the American Cancer
15 Society. And it was the second big study they did.
16 Q. Would you please give the jury a general description
17 of the ACS2 or CPS2 study?
18 A. The study consisted of a survey questionnaire, which
19 was administered to more than a million people in the
20 United States in, I think it was, 1982, I believe. And the
21 questionnaire asked some 200 different items of information
22 having to do with health and risk factors for disease and
23 mortality.
24 Q. If you could turn to Exhibit AIW 3660, doctor. And
25 I'll --

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1 Is that a copy of the actual questionnaire that
2 was used in the cancer prevention survey, 2?
3 A. That's one page of the questionnaire. For men there
4 was actually four pages of questions.
5 Q. Could you explain this questionnaire to

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the jury?
6 A. Well, I think just by looking at it the right
7 impression is gained, that the person selected to
8 participate would fill in their name and various other
9 information. And then against a list of the health related
10 questions, like family history and history of diseases --
11 do you happen to have the other pages?
12 Q. Yes, I do. Which page would you like me to show?
13 A. The next page is fine. And then there are questions
14 on diet. You can see the left there, diet. And they ask
15 what you eat, pork, chicken, liver, cheese, brussel
16 sprouts. They have all kinds of detail. And then there is
17 a section on medication and vitamins.
18 And the next page. Exercise. How much
19 exercise do you get they ask. And then they ask about,
20 other habits included in there is whether they are a
21 smoker or not, and some other details. They ask about
22 their occupations.
23 Over to the next page. And if they have
24 exposure to chemicals or pesticides and so on towards the
25 bottom. And yet other information.

4268
1 The point of taking a look here is to see the
2 comprehensive list of questions that were asked for more
3 than a million different people.
4 Q. And does your consulting firm have the data generated
5 whether these over one million people filled out the
6 questionnaire?
7 A. Yes, we have the computer tabulations, the actual
8 record by record data from the American Cancer Society,
9 which are computer versions of these forms filled out.
10 Q. How much data did this survey yield with respect to
11 the health and lifestyle choices of the people who
12 participated?
13 A. Roughly, if you have 200 items of information and
14 million people, there are about 200 million

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items of data.
15 Q. Did you compare the responses to the CPS2
16 questionnaires that were provided by the people who smoked
17 in that survey to the people who did not smoke?
18 A. Yes, I did.
19 Q. Now, did you examine their responses with respect to
20 a number of lifestyle choices?
21 A. Yes.
22 Q. Can you identify for the jury -- and you may find it
23 helpful to refer to Demonstrative 6291 -- what some of
24 those choices were?
25 A. Yes. Their exercising habits, their weight, exposure

4269
1 to toxic substances, and various others of the ones we just
2 saw on the questionnaire.
3 Q. Now, these exhibits, 6191 and 6192, that's just a
4 list of the different factors from -- as you compared
5 smokers and non-smokers?
6 A. Yes, maybe I haven't been clear.
7 If I were to take the questionnaires we just
8 talked about and find all the current smokers who
9 indicated they were current smokers and put them in one
10 pile, and then take all the ones who were never smokers
11 and put them in another pile, and then the former smokers
12 I'm going to leave aside. I'm going to make what I
13 consider a comparison between never smokers and current
14 smokers; former smokers I'm going to set aside. So it's
15 current cigarette smokers.
16 And then I look at the two piles and see how
17 many are doing their exercises in each pile.
18 I hope that's clear.
19 Q. Well, why don't we display to the jury Demonstrative
20 6191, which is a list of the first page of two of the list
21 of the different factors of which you compared current
22 smokers and never smokers.
23 In analyzing the CPS2 data, doctor, did you
24 find that, did you determine whether smokers or never
25 smokers were more likely to get little or no exercise,

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1 based upon the answers to the questionnaire?
2 A. Yes, I determined that.
3 Q. And who was more likely to get little or no exercise,
4 the smokers or non-smokers?
5 A. The smokers.
6 MR. WITHEY: Your Honor, can I have a
7 continuing objection. This is beyond this witness's
8 qualifications.
9 THE COURT: Why don't you move through it a
10 little quicker. Maybe you can summarize his.
11 BY MR. BIERSTEKER:
12 Q. Dr. Wecker, there are a number of different
13 categories on this first page. Could you just go down the
14 list and tell us whether the smokers were more likely to
15 engage in the particular lifestyle and choice?
16 A. Smokers every time on this page, check the left hand
17 box every time.
18 Q. Every time, I'll do that.
19 All right. And now there is a second
20 Demonstrative, Demonstrative 6192, which is a continuation
21 of this list. And why don't you go down that list and
22 tell us, based on your analysis of the CPS2 data, whether
23 smokers or non-smokers were likely to engage in those
24 activities?
25 A. Smokers eat more fried foods, more high fat foods.

4271

1 Let's do this the other way. The only 2 for never smokers,
2 never smokers eat more dessert and more butter and
3 margarine. So if you can get those 2, then every other box
4 is checked for smokers.
5 Q. Did you attempt to determine whether or not the
6 differences you observed between smokers and non-smokers,
7 and their choices with respect to these lifestyle factors,
8 whether those differences were of statistical significance?
9 A. Yes.
10 Q. And what did you find?
11 A. That every one, in every single instance there are --
12 every single instance was a statistically significant

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13 difference.
14 Q. Doctor, what is your understanding of the word "risk
15 factor"?
16 A. "Risk factor" refers to something that a person may
17 do or come to be exposed to, like say eating fried foods,
18 which shows a statistical association with some health
19 outcome like a disease or mortality.
20 Q. And did you examine the CPS2 data to determine from a
21 purely statistical standpoint whether or not the list of, I
22 guess it was, about two dozen factors that we looked at
23 were in fact associated statistically with a higher
24 incidence of mortality?
25 A. Yes. I looked at the data itself and I also looked

4272
1 at published literature to verify that everything on this
2 list is a risk factor for mortality.
3 Q. Doctor, you might want to -- did you, in the course
4 of your statistical analysis of the various factors that we
5 had up, investigate whether or not in the CPS2 data,
6 smokers had more combinations of each of those risk
7 factors, in other words we looked at them individually
8 before, did you look at combinations of them and compare
9 smokers and non-smokers?
10 A. Yes, I did.
11 Q. If you will turn to Demonstrative 6293. Is that a
12 chart you prepared that summarizes the results of your
13 statistical investigation of these data?
14 A. Yes, it is.
15 Q. Is it accurate?
16 A. Yes.
17 Q. Would it help the jury understand your testimony?
18 A. Yes.
19 Q. What, if you could just summarize briefly before we
20 display the Demonstrative, did you find?
21 A. That those 24 factors that we just looked at, and
22 looked at only one at a time, that it's also the case that
23 when you look at them in groups, say five, five of them at
24 a time or ten of them at a time, that smokers tend more so

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25 to have large groups of those risk factors.

4273

1 Q. I will put the demonstrative up. It's a little hard
2 to see.
3 Doctor, why don't you explain this chart to the
4 jury?
5 A. Okay. Let's just pick the bar on the right, because
6 each bar was done separately. So we'll take the one on the
7 right, the tallest one. It says 14 or more risk factors.
8 I went through the questionnaires for all, each
9 and every one of the smokers, and if I found one where
10 that particular individual had 14 of the 24 factors we
11 listed, or more, 14, 15, 16 up to 24, I would tally one
12 count of one for that.
13 And so on until I found out how many smokers,
14 or what proportion of smokers had that very high level of
15 risk factors, then I did the same thing for never smokers.
16 And the result is displayed here. There is
17 nearly a five times larger percentage of the smokers who
18 have this very high level of 14 or more risk factors.
19 Another way of saying that is, if you happen to
20 pull out one of these questionnaires and it had 14 or more
21 risk factors on it, it would be the odds of five to one
22 here that you would have a smoker in your hand.
23 Now, then you go down the list and so you can
24 see if there is like 12 risk factors, exactly 12, and then
25 that's a ratio of proportion of three. In other words,

4274

1 the smokers had three times as many of those and so on.
2 You finally get down to the left, and you find
3 zero risk factors. There are few smokers with zero risk
4 factors, but far more -- if it was even Steven it would be
5 at one on the left. So it's well below one, so it means
6 when it comes to zero risk factors that's mostly the

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7 non-smokers.
8 Q. From your analysis of the CPS2 data, did you reach
9 any conclusions about differences in the lifestyle choices
10 of smokers and non-smokers with respect to the factors that
11 you analyzed?
12 A. Yes.
13 Q. And what was your conclusion?
14 A. That there are many such differences, and those are
15 differences that are affecting health outcomes. And in the
16 main, there are differences that are risk factors for
17 mortality.
18 MR. WITHEY: Move to strike the portion that
19 they affect health outcome, your Honor.
20 THE COURT: Overruled.
21 BY MR. BIERSTEKER:
22 Q. Do you know who was the inventor of the attributable
23 risk formula?
24 A. You should have told me you were going to ask this.
25 The earliest article I know is from 1953 by

4275
1 Levin, I think it's L-E-V-I-N. It could have been an
2 earlier one, but that's the earliest one I know.
3 Q. Are there any statistical assumptions underlying that
4 formula when it's used to attribute deaths to particular
5 factors like smoking?
6 A. Yes.
7 Q. What are those assumptions?
8 A. That particular formula, which is for, I think we are
9 talking about the same thing, its the same one that is used
10 in the Surgeon General's report, same one that was used to
11 calculate the attributable deaths in this case. Then the
12 assumption of that formula is that all other things are
13 equal as between the two groups, so if you are comparing
14 smokers versus non-smokers the formula assumes that those
15 two groups are otherwise absolutely alike when it comes to
16 other risk factors. It's not -- and it's assumed to be
17 clear, that that is not the case. That one of the group
18 has more risk factors than the other.

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19 Q. And when that assumption is violated, when all other
20 things are not equal, as between smokers and non-smokers,
21 what are the implications for the estimates that you get
22 when you use that formula?
23 A. Well, then, that formula, which only looks at one
24 thing and makes no attempt to control or adjust for these
25 other factors, because under its assumptions it didn't need

4276

1 to because it assumed there was nothing else to control
2 for, then the result is the effect that you estimate will
3 be a mixture of effects. It will be an effect due to the
4 smoking, an effect due to exercise, an effect due to high
5 fat foods, and all other things that differ between two
6 populations all combined into one number.
7 Q. Did Levin speak to this issue in his 1953 article?
8 A. Yes, he did.
9 Q. If you could summarize what he had to say?
10 A. Well, I remember he said that he was real clear on
11 the assumption it has to be no difference in risk factors,
12 and if there was a difference of the kind that we have been
13 discussing with risk factors for the one population
14 compared to the other, that the estimate would be an
15 overestimate, because it would include more than one thing.
16 And it wouldn't be an estimate of the -- it wouldn't just
17 be a pure estimate of the thing that was wanted.
18 I believe he said it would be the maximum
19 possible value that could occur, which is just a way of
20 saying that it has to be less than the number you get,
21 because the number you get includes, say, smoking and it
22 includes exercises and some other things as well.
23 Q. Did you prepare a chart, doctor, Demonstrative 6194,
24 showing the actual number of deaths in the United States in
25 1990 due to diseases that the Surgeon General has said can

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1 be caused by smoking?
2 A. Yes, I did.
3 Q. And where did you get the data that went into this
4 chart?
5 A. Well, I've forgotten that. I would have to look
6 through United States deaths in 1990 of persons age 35 and
7 older. If you want me to look at my work papers I can get
8 it.
9 Q. That's all right. Did you turn to the 1989 Surgeon
10 General report and basically --
11 Why don't we just display then the number of
12 deaths that were in 1990, based upon the data that
13 occurred among people age 35 and older from the diseases
14 that the Surgeon General has identified as being causally
15 related to smoking?
16 MR. WITHEY: I think it is leading, your Honor.
17 THE COURT: Overruled.
18 THE WITNESS: Okay. Is there a question?
19 THE COURT: Yeah. Go and ahead and answer it.
20 THE WITNESS: I'm sorry, I didn't understand
21 it.
22 BY MR. BIERSTEKER:
23 Q. Why were you interested in knowing the number of
24 these deaths?
25 A. Oh, because I wanted to make a comparison between

4278
1 what the actual deaths were to this calculated number, the
2 so called attributable deaths, as part of my further
3 explanation of the untrustworthiness of that technical
4 calculation when you don't really control it.
5 Q. Did you calculate attributable deaths for these same
6 conditions, using the attributable risk formula, but
7 instead of looking at smoking looking at other factors?
8 A. Yes.
9 Q. Was exercise one of the factors that you looked at?
10 A. Yes.
11 Q. And why don't you turn to Demonstrative 6195?
12 A. Okay.
13 Q. Is this a demonstrative that you prepared,

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sir?
14 A. Yes.
15 Q. Does it accurately summarize the results of your
16 application of the attributable risk formula to these
17 deaths, but instead of looking at smoking looking at
18 exercise?
19 A. Yes.
20 Q. Would it assist the jury in understanding your
21 testimony?
22 A. Yes.
23 Q. Why don't you explain, all right? Does that show the
24 results of that calculation, sir?
25 A. Yes.

4279
1 Q. And why don't you explain it to the jury?
2 A. Well, the number on the right side of the bar, the
3 blue bar, is the result of using attributable death
4 calculations, where I compared the two groups, the ones
5 that had moderate or heavy exercise, the answer to the
6 questionnaire: I do moderate exercise; or they answered I
7 do heavy exercise. I compared that to the group that says
8 I do little or no exercises and did the same attributable
9 death calculation that we talked about in the case of
10 smoking.
11 And it resulted in 567,000 deaths attributable
12 to lack of exercise.
13 Q. Did you then repeat the calculation looking at
14 dietary factors?
15 A. Yes.
16 Q. And does exhibit 6196 display the results you
17 obtained when you repeated the same calculation looking at
18 dietary factors?
19 A. Yes.
20 Q. And is it accurate?
21 A. Yes.
22 Q. Would it assist the jury in understanding your
23 testimony?
24 A. Yes.
25 Q. All right. Doctor, why don't you explain

4280
1 Demonstrative 6196 to the jury?
2 A. There are an additional 758,000 deaths were the

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3 result of the calculation attributed to unhealthy diet,
4 which was a category I got out of a published literature,
5 which includes eating all the stuff your mother tells you
6 to eat; carrots, and breakfast, and cabbage, and broccoli,
7 and brussel sprouts, and leafy green vegetables, and so on.
8 If you don't do that, then I calculate you are in the group
9 that has the higher mortality.
10 Q. Did you repeat the calculation again for a number of
11 other factors?
12 A. Yes.
13 Q. And does Demonstrative 6197 display the results of
14 your having repeated the application of the same formula
15 with regard to some additional factors?
16 A. Yes.
17 Q. Is it accurate?
18 A. Yes.
19 Q. Would it help the jury understand your testimony?
20 A. Yes.
21 Q. Displaying Demonstrative Exhibit 6197. And would you
22 explain that demonstrative to the jury?
23 A. Yes. The additional items on here are overweight or
24 underweight, high blood pressure, and lack of social
25 support or stress.

4281
1 That lack of social support is a composite
2 group involving how you answer the questionnaire, about
3 whether you go to church and belong to clubs or groups,
4 whether you are married, and so on, reflecting a presence
5 of social support in one's life, which is related to the
6 better health and mortality.
7 Q. How many deaths doing this in series were you able to
8 attribute to the different factors?
9 A. At the bottom I tallied up 2,480,000 attributable
10 deaths.
11 Q. And how many actual deaths were there?
12 A. On the left side, 1,108,000.
13 Q. Why does this happen?
14 A. It's simple enough. That each of these calculations
15 is not what it appears to be on its face but, in other
16 words, it's not the effect of exercise that I

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used here, it
17 is really a mixture of the effects of exercise and other
18 things, because there is no controlling for the other
19 factors.
20 In other words, the people that don't do their
21 exercise probably also don't have too good a diet and may
22 have a tendency toward overweight or underweight and
23 so on, so there is double counting here, because these
24 factors tend to cluster.
25 Q. Doctor, have you examined the CPS data, and have you

4282
1 calculated the relative mortality risk of smokers limiting
2 the analysis to folks, to smokers who are of average weight
3 and who exercise at least moderately, and who are on the
4 good side of the diet answers compared to never smokers who
5 don't exercise are on the bad side of the diet equation and
6 who are overweight?
7 A. Yes.
8 Q. Is that calculation -- is the result of that
9 calculation found in Demonstrative 6198?
10 A. Yes.
11 Q. Is it accurate?
12 A. Yes.
13 Q. Would it assist the jury in understanding your
14 testimony?
15 A. Yes.
16 Q. Displaying Demonstrative 6198.
17 Doctor, why don't you explain this chart to the
18 jury?
19 A. Okay. This will take a bit of explanation. I think
20 I made clear so far that when you look at a relative risk
21 for smoking, if it's a so called crude or raw relative risk
22 not adjusted for any of these other factors, it's going to
23 be a mixture of factors so you are going to be looking at
24 the elevation all right, but the elevation may be due to
25 smoking, exercise, diet and any one of a number of other

4283
1 risk factors all combined, okay?
2 I thought of this way to illustrate

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that.
3 Suppose it were the case, contrary to fact, that the
4 smokers were the ones who were doing their exercises
5 regularly and eating their leafy greens and watching their
6 weight, suppose that it could be that way -- it isn't, but
7 suppose that were the case? And suppose it was the
8 non-smokers who were not eating a good diet and who failed
9 to exercise and were not watching their weight, okay?
10 Q. All right.
11 A. And suppose then you just went ahead and did a
12 relative risk for smoking comparing those two groups.
13 In that case, you would find that the smokers
14 had a much lower mortality than the non-smokers.
15 Q. And that's what the .38 --
16 A. Right. Because you are looking at the effects that
17 are all masquerading for smoking, rather than the smokers
18 showing an increased mortality and leading to the
19 impression, I think the false impression, that all that
20 may be due to smoking. You would come to the conclusion
21 that smoking is really great if you want to prolong
22 mortality or if you -- well, you get it.
23 Because you would have this reverse result, and
24 it's just an illustration of how strong those other
25 factors are. They are not little factors. Exercise and

4284
1 diet are big factors right along side of smoking. And so
2 if you have differences as between the two groups it can
3 completely control the way the result comes out.
4 Q. Doctor, when we were displaying earlier the risk of
5 factors that you examined, I believe alcohol consumption
6 was one of them, is that right?
7 A. Yes.
8 Q. And smokers, as I recall, tended to drink more than
9 the non-smokers?
10 A. Yes.
11 Q. Did you calculate the relative mortality

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risk of
12 light and heavy smokers compared to non-smokers for
13 cirrhosis of the liver in the CPS2 data?
14 A. Yes.
15 Q. And have you prepared a demonstrative chart that
16 would illustrate that calculation?
17 Why don't you turn to 6199. Is that the chart,
18 and is it accurate.
19 A. Yes.
20 Q. Would it assist the jury in understanding your
21 testimony?
22 A. Yes.
23 Q. Okay. These are the relative risks of death, then I
24 take it from cirrhosis of the liver among never smokers,
25 light smokers, and heavy smokers, is that right?

4285
1 A. Yes. Relative risks of death for cirrhosis of the
2 liver depending on whether you are a never, light or heavy
3 smoker.
4 Q. And is cirrhosis of the liver one of the diseases the
5 Surgeon General has said can be caused by smoking?
6 A. It is not one of the smoking related diseases.
7 Q. And then why, in your view, do the smokers have such
8 elevated risk for cirrhosis of the liver, based on your
9 analysis of the data?
10 A. It's because these are uncontrolled relative risks.
11 So the relative risk of the smokers for cirrhosis of the
12 liver is, again, a combination of factors, not just
13 smoking, it would include heavy drinking as well, because
14 any of the uncontrolled estimates are mixtures of effects.
15 And in this case, the mixture, we know that
16 it's the drinking factor, because drinking is the factor
17 that I understand is the factor that figures into
18 cirrhosis of the liver, not smoking.
19 Q. When the plaintiff's experts calculated the 400,000
20 deaths per year that they attributed to smoking, did they
21 take into account the differences between smokers and
22 non-smokers with respect to the factors that we

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have been
23 talking about during the course of your
testimony?
24 A. No, there was absolutely no attempt to
control for
25 these other factors.

4286
1 Q. And how does that relate to your opinion
about the
2 reliability of the 400,000 death estimate?
3 A. That's exactly why it is unreliable.
Because if you
4 don't attempt to make controls for other
factors, when
5 there are other factors present, that differ
between the
6 two groups, then your estimate will be a
combination of
7 things and you have not isolated the effect of
smoking; you
8 have a mixture of effects.
9 Q. Doctor, why don't you turn to the 1996
Surgeon
10 General's report on pages 145 to 146, that's AS
40 in your
11 book. And I've blown up a quote from that
particular page
12 I wanted to ask you about.
13 A. What's the number, please?
14 Q. AS 40. I don't know if you can read it on
the
15 screen. The 1996 Surgeon General's reports on
exercise,
16 page 145 to 146. Can you read that?
17 A. Yes.
18 Q. I would like to read it to you, and then
ask you
19 something about it. It says, "Published
estimates of the
20 number of lives lost in a year because of
inactivity have
21 ranged from 200,000 for inactivity alone to
300,000 for
22 inactivity and poor diet combined. Such
estimates are
23 generally derived by calculating the population
24 attributable risk, paren, PAR, which is based on
both the
25 relative mortality rate associated with
inactivity and the

4287
1 prevalence of inactivity in the population.
2 Such estimates are inherently
uncertain because
3 they do not take into account the reality that
some people
4 have more than one risk factor for a disease;
for these
5 people, the elimination of a single risk
factor, e.g., by
6 becoming physically active, may not reduce

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mortality risk
7 to the level attainable for people who initially have only
8 that one risk factor. PAR, or population attributable
9 risk methods thus overestimate the proportion of deaths
10 avoidable by eliminating one modifiable risk factor, in
11 this case physical inactivity.
12 Doctor, from a statistical perspective, what
13 does that mean?
14 A. Well, its the author's way of saying what I was
15 saying. The author says, if you have a relative risk for
16 some factor and then the population stops doing that,
17 whatever that factor is, you won't get the fact that you
18 think you would get, based -- looking at the relative risk.
19 They say it's because some people have more
20 than one risk factor. I guess that's okay to say. I
21 would say the risk factor is too high in the first place,
22 the estimate is too high. You are starting with an
23 estimate that is too high, so it is wrong to believe you
24 are going to get that big of an effect, because the risk
25 factor is a combination of what you compared and several

4288
1 other risk factors you wished you had separated out.
2 Q. If one wants to isolate in a statistically valid way
3 the effect of one mortality factor, whether it is smoking
4 or diet or exercise, whatever, what, from a statistical
5 perspective, do you have to do in order to isolate these
6 statistical facts of just that one factor?
7 A. Of that one factor?
8 Q. Yes.
9 A. The best way is with a designed experiment. And in
10 many instances that's what we do. So that's clearly the
11 preferred approach, because in a designed experiment, what
12 that means is you arrange things so that other things are
13 equal in the two groups so that you don't have this problem
14 of having to adjust, because you have arranged

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to collect
15 data in a way that you can compare like to like. That's
16 the best way.
17 But if you, if you don't have that luxury of a
18 designed experiment, and you have so-called
19 non-experimental data, or we sometimes say observational
20 data -- like the American Cancer Society data is not a
21 designed experiment, people went and gave people
22 questionnaires, that's not a designed experiment -- then
23 you have a situation where you are not comparing like to
24 like and you have to make adjustments. And that's a
25 difficult process.

4289
1 But if you don't do it, then your estimates
2 are, as we say, confounded, because they included the
3 thing you are interested in and include a bunch of other
4 things.
5 Q. Is that principle, that I think you said you wanted
6 to compare like to like with either a design experiment or
7 controlled for other things, is that principle, if you want
8 to isolate statistically the effect of just one factor
9 unique to smoking?
10 A. No, that's a basic statistical principle that would
11 apply to any one thing you want to isolate.
12 Let me say that again --
13 THE COURT: Wait until there is a question.
14 BY MR. BIERSTEKER:
15 Q. Doctor, if you wanted to isolate --
16 THE COURT: Let me ask the attorneys to
17 approach.
18 (The following discussion was conducted at the
19 side bar between court and counsel, out of the hearing of
20 the jurors, as follows:)
21 THE COURT: This is dragging to the point where
22 it was made, in the first five or six questions you have
23 repeated it now probably 30 times. Unless he's going to
24 something new, I want to get the thing over with.
25 MR. BIERSTEKER: I'm almost done.

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1 THE COURT: Don't go over anything.
2 MR. BIERSTEKER: I want to talk about his
3 application of his principle. We need to compare like to
4 like to one other context.
5 MR. WITHEY: He's already done that.
6 (The following proceedings were conducted in
7 open court.)
8 BY MR. BIERSTEKER:
9 Q. Doctor, if you wanted to isolate in a statistical
10 manner the effect of the defendant's conduct, obtain
11 smoking behaviors, would you have to control for other
12 factors that might influence smoking behaviors?
13 A. You would either have to have a designed experiment
14 where you had like to like, or you would have to, if you
15 don't have that you would have to figure out what other
16 factors influence smoking behavior and take account of them
17 in a calculation which controls for it.
18 Q. Is that an easy thing to do with observational data?
19 A. It's, I don't know if I should call it hard or easy,
20 it is what statisticians do. Sometimes it's easier than
21 other times.
22 Q. Have there been experiments that have looked at the
23 effect of information on smoking behaviors?
24 A. Yes.
25 Q. Why don't you turn to exhibit AS 1372?

4291

1 MR. WITHEY: Beyond the scope of the
2 designation, your Honor.
3 THE COURT: Where in the report is it?
4 MR. BIERSTEKER: Pardon me?
5 THE COURT: Where in the report?
6 MR. BIERSTEKER: It's listed in his reliance
7 materials, your Honor.
8 THE COURT: Where does he discuss it in his
9 report?
10 MR. BIERSTEKER: I don't believe there is an
11 expressed discussion of this particular publication.
12 THE COURT: I'll sustain the objection.
13 BY MR. BIERSTEKER:
14 Q. All right. Doctor, did you read the

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reports of Dr.
15 Harris and some of the other plaintiffs' experts in this
16 case?
17 A. Yes.
18 Q. Did they do an experiment of the kind we have been
19 talking about to try to isolate the effect of the
20 defendant's behavior, defendant's conduct on the smoking
21 behavior of the participants in the plaintiff's trust?
22 MR. WITHEY: Objection, beyond the scope of
23 this case, your Honor.
24 THE COURT: I'll sustain it, but just for the
25 reason he doesn't have personal knowledge. We'll count

4292
1 upon the jury to recall whether or not he testified
2 whether he had done such a thing.
3 BY MR. BIERSTEKER:
4 Q. Did the analyses done by Dr. Harris, and the other
5 experts in their reports, attempt to statistically isolate
6 the effect of the defendant's conduct by controlling for
7 other factors the effect of the defendant's conduct on the
8 smoking behavior on the participants in the other trust by
9 controlling other factors?
10 MR. WITHEY: Same objection, your Honor.
11 THE COURT: Sustained.
12 MR. BIERSTEKER: I have no further questions,
13 your Honor.
14 THE COURT: Cross examination.
15 CROSS EXAMINATION
16 BY MR. WITHEY:
17 Q. Good afternoon.
18 A. Good afternoon.
19 Q. Just to be clear to the jury, you are not an
20 epidemiologist and you haven't taken a class in
21 epidemiology, correct?
22 A. I haven't taken a class with the name epidemiology,
23 but epidemiology is just the application of statistics to
24 human health, and I've taken statistics class.
25 Q. You have not published a paper in the epidemiological

4293
1 journals, correct?
2 A. That's correct.

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3 Q. You have not published an article in the medical or
4 scientific literature on biostatistics, correct?
5 A. Yes, if you don't count my article on lead.
6 Q. And you are not here to testify about causation,
7 medical causation, or whether smoking causes diseases,
8 correct?
9 A. That's true.
10 Q. And when you, just to be clear, when you first
11 received the American Cancer Society data, you were working
12 for the tobacco industry in that connection, correct?
13 A. Yes, they asked me to look at it, that's true.
14 Q. And do any of your publications in your curriculum
15 vitae apply a methodology at all to the question of smoking
16 and disease or health care expenditures?
17 A. No.
18 Q. You have not published any paper in the medical
19 literature on the concept of the smoking attributable
20 fraction or smoking attributable expenditures, correct?
21 A. That's correct.
22 Q. You have no articles in the literature that refer or
23 pertain to the data from the ACS2 or CPS2 studies, isn't
24 that correct?
25 A. That's correct.

4294
1 Q. Certainly you have not -- strike that.
2 You have not cited any report -- or excuse me,
3 literature or article that you have written for the
4 proposition that smokers choose riskier lifestyles, is
5 that correct?
6 A. That's correct.
7 Q. You have not concluded that choosing a risky
8 lifestyle is, in fact, the cause of smoking, or that
9 smoking is the cause of the riskier lifestyles?
10 A. That's correct.
11 Q. You have not published a paper in the peer review
12 literature on the attributable risk formula or population
13 attributable risk?
14 A. That's correct.
15 Q. You have given your opinion in court that the Surgeon

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16 General's figure of 420,000 deaths per year from smoking
17 attributable causes is not reliable, but you have not
18 published that opinion in any peer reviewed article in the
19 literature, correct?
20 A. That's correct.
21 Q. And you understand the purpose of peer review is to
22 subject ideas and data and your analyses of the data to a
23 scientific process, correct?
24 A. That's not what I would think. I'm on the editorial
25 board of the American Statistical Association, that's not

4295
1 the way we describe our job.
2 Q. From the scientific standpoint, science grows and
3 develops because people are willing to put their ideas,
4 hypothesis and data they have gathered into the realm of
5 the scientific community so that other scientist can take a
6 look at it and see if it should be criticized or replicated
7 in that part of the scientific process.
8 A. I'll be brief. Our editorial charge is to publish
9 new knowledge, that's the short way of saying what we do.
10 Q. All right. No one's published this new knowledge
11 that you ever brought to this jury, isn't that correct?
12 A. Oh, I think that's widely known.
13 Q. But you have not published it?
14 A. No.
15 Q. You have not subjected the opinions that you have
16 expressed in court to the peer review process, correct?
17 A. No, they are all old hat.
18 Q. Okay. Old hat.
19 So I take it, then, that the -- well, you
20 understand there was a process by which the Surgeon
21 General promulgates the 1989 report where the attributable
22 risk formula is set forth?
23 A. The report writing process?
24 Q. Yes.
25 A. I'm sure there is a process, I'm not familiar with

4296
1 the details.
2 Q. And you are familiar with the fact that

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some of the
3 leading scientists, epidemiologists, doctors, health care
4 economists are brought together to draft these reports, and
5 statisticians as well, correct?
6 A. I would assume so.
7 Q. All right. And the panel of people that put forth
8 this report is very well-respected in the medical,
9 scientific, and health care community.
10 Fair enough?
11 A. Okay.
12 Q. I assume you were not asked to participate in the
13 process of any Surgeon General's report.
14 Is that fair enough?
15 A. That's true.
16 Q. And the process of developing a Surgeon General's
17 report is a consensus process, correct, if you know?
18 A. It seems like it must be, just looking at the report.
19 Q. In other words, it's not just one individual's idea
20 who comes forth and says, I have this idea, and it gets
21 into the Surgeon General's report. It's subject to the
22 process of consensus, building amongst the people who are
23 involved in that process.
24 Fair enough?
25 A. I think that's responsible.

4297
1 Q. And if the number of deaths from smoking, that is the
2 diseases caused by smoking, isn't 420,000, do you have
3 another number to give to this jury, or are you saying you
4 just don't know?
5 A. I know it has to be less than that, and I'm confident
6 it's a lot less. I don't have a number, that's the
7 problem. It's a confounded estimate.
8 Q. So you don't have a number?
9 A. No, I don't.
10 Q. It's a lot of people though, fair to say?
11 A. What?
12 Q. That die of smoking related diseases?
13 A. Yes, many people die of smoking related diseases.
14 Heart disease is smoking related disease; many non-smokers
15 die of it.
16 Q. Fair enough.
17 Let me ask you if you are familiar with the

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18 Surgeon General's report at page 157. This is the Surgeon
19 General report of 1989?
20 A. I don't have that here.
21 Q. I'll put it up for you.
22 You don't have that with you?
23 A. No, I don't.
24 Q. Let me just put it up on the view graph.
25 Do you see on table 11, this is again of

4298

1 chapter 3?
2 A. Is this 1989?
3 Q. Yes, sir?
4 A. I can't see it very well.
5 Q. I'm sorry about that?
6 THE COURT: You can look to your right.
7 BY MR. WITHEY:
8 Q. This is table 11 on page 156 saying estimated rate
9 for attributable risks for 10 selected causes of death from
10 cigarette smoking.
11 Do you see that?
12 A. Yes.
13 Q. I take it this is one of the tables you reviewed in
14 your opinions?
15 A. Yes.
16 Q. And let me direct your attention to the statement on
17 the next page. The total ten-cause smoking-attributable
18 mortality for 1985 was 337,000 deaths, compared to 183,000
19 in 1965.
20 Do you see that?
21 A. Yes.
22 Q. And you understand that the Surgeon General in this
23 report was attributing the deaths to these specific ten
24 diseases on Table 11, correct? Is that correct?
25 A. I'll take your word for it. I can't tell you by just

4299

1 looking at this.
2 Q. Well, you are familiar with the table on the relative
3 risks of smoking that's contained within this, correct?
4 A. Yes, I know that.
5 Q. Let's put that one up if we could, plaintiffs 156.
6 The jurors saw this in the testimony of
7 Dr. Harris. These are the relative risks of current
8 smokers and former smokers, men for approximately 18

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9 diseases.
10 Do you see that?
11 A. Yes.
12 Q. And those, the values for those came from the CPS2
13 study, correct?
14 A. Yes.
15 Q. Now, you have not gone back to see if any of the
16 relative risks of smoking for these diseases, would change
17 either up or down if there was control for habits or the
18 lifestyle changes that you have testified to, correct?
19 A. For specific diseases?
20 Q. Yes.
21 A. I had a chart for mortality but I didn't do one for
22 each specific disease.
23 Q. You are not here to tell the jury the true relative
24 risk for COPD isn't 9.95 but it is some other number
25 because some of those people may not have gone to church on

4300
1 Sunday, or temple on Sunday?
2 A. No, I do not say it is 9.95, but it is some number,
3 other number. That number is a mixture of effects.
4 Q. What is the number?
5 A. I don't have the number. That would require me to do
6 the study that I haven't been asked to do, and nobody's
7 done.
8 But I do have the people, and I can go far
9 enough to say that's a mixture of effects. I have no
10 doubt about it.
11 Q. You have not gone back to look to see if those
12 relative risks would be different and give a numerical
13 value to those risks?
14 A. No, I haven't done that.
15 Q. And in your chart on these habits, lifestyle habits,
16 do you recall that?
17 A. Yes.
18 Q. You don't control for age in that chart, did you,
19 sir?
20 A. No.
21 Q. Okay. And you are not here to say -- if we could
22 have Plaintiff's Exhibit 207 -- you are not here to say
23 that these various items, not married, little or

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no
24 exercise, et cetera, are causes of lung cancer? You are
25 not here to testify to that, are you?

4301
1 A. Well, you said causes, so I don't have opinions as a
2 statistician about cause, just statistical association.
3 Q. Let me tell you what we have done here. We have
4 listed the habits that you have identified in your charts
5 that Mr. Biersteker asked you about.
6 Do you see that on the bottom? Those are the
7 ones that you selected?
8 A. Yes.
9 Q. And you had a number of different choices to make as
10 to which habits or lifestyle habits that you wanted to use
11 in your charts, correct, from the CPS2 data?
12 A. Yes, I think I understand you.
13 Q. Okay. In other words, the CPS2 data or the CPS2
14 study didn't say, here are the lifestyle habits that we
15 have looked at. You went in and selected which ones you
16 wanted to put in your charts.
17 Fair enough?
18 A. Not exactly. I looked at literature to find places
19 where the literature cited certain things. And then if the
20 questionnaire had that, I used it.
21 Q. But that requires a judgment as to what might be a
22 risk factor for a particular disease, does it not?
23 A. It requires a judgment by the people who designed the
24 questionnaire, to put it in the questionnaire in the first
25 place. And it requires a judgment or calculation by people

4302
1 who wrote literature suggesting that it's a risk factor.
2 Q. Now, what we have done here in this chart is look at
3 what is, in fact, the differences for each of these
4 variables between smokers and non-smokers.
5 Do you see that?
6 A. Yes.
7 Q. And if the relative risk of exposure to one end or
8 the other is one, that means they are essentially the same

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9 as between smokers and non-smokers, correct?
10 A. Yes.
11 Q. And you can see on this line at least there are a few
12 under one, more dessert and more spreads.
13 Do you see that?
14 A. Yes.
15 Q. And there are a few, most of them are around the one
16 level saying there is very little difference between
17 smokers and non-smokers, as to each of these supposed risk
18 factors; fair enough?
19 A. They are not around one, all the others are above
20 one; some by a little bit, some by a little more.
21 Q. There are a few caffeinated beverages, beer and
22 liquor, that are greater at three or four levels greater,
23 but the others are more or less in the 1.5 range, something
24 like that, correct?
25 A. Okay.

4303
1 Q. As a layman when I look at this, I say, gee there is
2 not a whole lot of difference between smokers and
3 non-smokers as to whether they are married or not, little
4 or no exercise, not a high school graduate, sleep more or
5 less than seven hours; fair enough? Is that right?
6 A. That you as a layman say that?
7 Q. Yeah. That's what I read and looked at, there is not
8 a whole lot of difference between smokers and non-smokers
9 in the relative risk over here is near one.
10 Is that a fair way of reading this chart?
11 A. Maybe for a layman, that's not how I look at it.
12 Q. Let's go to the next chart. This is yours, is it
13 not?
14 A. Looks like mine.
15 Q. And what I want you to do is agree with me that the
16 presence of 14 risk factors right here on the far right is
17 something that you have pointed out has a relative risk of
18 above 4?
19 A. Yes.
20 Q. In other words smokers are -- now I want to go to the
21 next chart, if you will, because I want you to

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focus on
22 this 14 and see how many there actually are.
23 This is an exposure to the multiple risk
24 factors of smokers versus non-smokers.
25 Do you see what this chart is?

4304
1 A. Yes.
2 Q. And what it does is, it points out that very few
3 people on this chart have either zero risk factors in their
4 lives, smokers or non-smokers, and very few have 13, 14 or
5 15. That's what this chart says to me.
6 Would you agree with that?
7 A. Sure, there are very few Mr. Perfects and very few
8 people who have such extremes as 14 or more.
9 Q. So that 14 on the previous chart, if we can go back
10 to it. That 14, that big graph over there is actually --
11 if we can go to the next one, that is right here, correct?
12 A. I don't think so. Mine is 14 or more and yours is
13 14.
14 Q. Yes.
15 A. So if yours are 14 -- if you see my chart is 14 or
16 more, 14, 15, 16, 17, 18, 19, 20; 14 or more.
17 So it is not the same.
18 Q. It is not the same but it shows how relatively few
19 people are in that category?
20 A. No. Mine is 14 or more, yours is just 14.
21 Q. In terms of the issue of these supposed factors like
22 whether you go to church or whether you eat desserts or not
23 may be a confounding factor for risk of getting cancer,
24 other diseases, the Surgeon General has given an opinion on
25 that, has he not?

4305
1 A. There is -- I recall various discussions of
2 confounded but I don't know specifically what you mean.
3 Q. Let's turn to Exhibit 3282 and see what the Surgeon
4 General has to say on the second.
5 Do we have that next one? Could we focus in on
6 the top as discussed in Chapter 2?
7 This is from page 129 of the Surgeon Generals
8 report, as discussed in Chapter 2.
9 Numerous attempts to control

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statistically for
10 confounding and stratifying variables have not materially
11 altered the estimated relative risk for smoking related
12 diseases, correct?
13 A. I see that.
14 Q. And you have read the Battelle study and you know
15 that the Battelle report examined the question of whether
16 the relative risks found in the Surgeon Generals report
17 were confounding for a whole lot of variety of variables,
18 correct?
19 A. For a few, not a whole lot.
20 Q. Let's see which ones they looked at. This would be
21 Plaintiff's Exhibit 4806. This is a chart showing -- this
22 is the Battelle study.
23 You have read this?
24 A. Yes.
25 Q. You were aware of this when you wrote your report?

4306
1 A. Yes.
2 Q. Smoking attributable mortality for confounding --
3 this is a summary of the interaction items included in the
4 final model for the eight gender and disease combinations.
5 This indicates what interactions were included: Age,
6 diabetes, diabetes and age, hypertension and age,
7 hypertension and diabetes, alcohol and diabetes, education
8 and hypertension for males and females, for coronary heart
9 disease, cerebrovascular disease, COPD and lung mottling,
10 correct? Did I correctly summarize these are the kinds of
11 interactions that Battelle looked at?
12 A. I didn't follow you but it's various interactions
13 have to go do with age and diabetese, hypertension and
14 alcohol.
15 Q. And they looked at that related to a number of
16 diseases the Surgeon General has determined was caused by
17 smoking, correct?
18 A. Yes.
19 Q. And let's go to the conclusions of the Battelle
20 report. Could you blow that up, please.
21 The results show these analysis also

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indicate
22 that there is little residual confounding of the relative
23 risk once age is taken into account. That is, the
24 differences between the fully adjusted relative risk and
25 age adjusted relative risk were minimal.

4307
1 That is their find findings?
2 A. Yes, when adjusting for just those factors.
3 Q. All right. Let's go to the next one. Is that it?
4 So in adjusting for those factors, the Battelle
5 report found little residual confounding -- strike that.
6 You understand that the figure of 420,000
7 smoking attributable deaths did not include people who
8 died of cirrhosis of the liver, did it?
9 A. It did not.
10 Q. And in fact, the Surgeon General in 1964 already
11 concluded the same thing you brought to this jury, did it
12 not? Do you recall that?
13 A. That the estimates of uncorrected relative risk are
14 confounded?
15 Q. No, for cirrhosis of the liver?
16 A. That's an example of confounding, right.
17 Q. Could we go to the portion of the 1964 Surgeon
18 General's Report.
19 The Surgeon General looked at the issue of
20 smoking and alcohol and cirrhosis of the liver, correct?
21 And concluded the data are not sufficient to support a
22 direct or causal association.
23 In 1964 the Surgeon General found this to be
24 true, isn't that correct?
25 A. Well, I read it. I'm not sure what you mean by it.

4308
1 Q. Well, in other words, the factor that there is the
2 chart that you put up from your testimony, was what the
3 Surgeon General looked at in 1964, is that -- that's what
4 I'm asking?
5 A. Yes, it's well-known.
6 Q. You are not the first to say this, correct?
7 A. That's true.

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8 MR. WITHEY: Nothing further. Thank you.
9 THE COURT: Do you have any Mr. Biersteker, any
10 redirect?
11 MR. BIERSTEKER: Just a few questions, your
12 Honor.
13 - - -
14 REDIRECT EXAMINATION
15 BY MR. BIERSTEKER:
16 Q. Dr. Wecker, what was your point in doing the
17 cirrhosis of the liver example?
18 A. As an illustration in a case that was not
19 controversial of how these uncorrected relative risks are
20 really a combination of factors.
21 In this case, the apparent effect of smoking on
22 cirrhosis of the liver is known to be a false result and
23 it is entirely the result of confounding, as I showed, and
24 as the Surgeon General and others have talked about before
25 me.

4309
1 Let me -- can you just for a second.
2 It also illustrated how very large these
3 effects can be. They are not diminimus effects. Those
4 bars that were on the cirrhosis of the liver were quite
5 large.
6 Q. Doctor, Mr. Withey asked you about the Battelle
7 report, and I had just a couple questions about it.
8 First, let me put up the introduction. And did
9 you note when you read this report that neither the United
10 States Government nor Battelle would take any
11 responsibility or liability for reliance upon the
12 information contained herein, and didn't warrant or
13 otherwise represent in any way the accuracy, adequacy,
14 efficacy, or applicability of the contents of this report?
15 A. I recall seeing that.
16 Q. Do you know whether or not -- and let's just turn the
17 page. The Battelle report was not published in the peer
18 reviewed literature, was it?
19 A. I think not.
20 Q. They do, however, talk about an article that appeared

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21 in the peer review literature by Sterling?
22 A. Yes, I know that one.
23 MR. WITHEY: Beyond the scope, your Honor. It
24 is a different subject matter than Battelle.
25 MR. BIERSTEKER: Your Honor, I believe it is

4310

1 and I'll be happy to tie it up. This is going to be one
2 or two questions.
3 THE COURT: Go ahead.
4 MR. BIERSTEKER: Thank you.
5 Q. Didn't Battelle note that contrary to their results,
6 Sterling and all report that further adjustment for alcohol
7 and income reduces the estimated age adjusted, AF
8 attributable fraction, and SAM, smoking attributable
9 mortality, considerably?
10 A. Yes. Those are additional adjustments that were not
11 made by Battelle.
12 Q. Is it true that the Sterling article is the only
13 article to have appeared in the peer review literature that
14 addresses this subject?
15 A. It's the only one I know of.
16 MR. BIERSTEKER: I have nothing further, your
17 Honor.
18 MR. WITHEY: Can I have one question on
19 Sterling, your Honor.
20 THE COURT: I'll allow just one.
21 MR. WITHEY: Thank you.
22 - - -
23 RECROSS EXAMINATION
24 BY MR. WITHEY:
25 Q. Dr. Wecker, in the article itself, does it reflect

4311

1 the fact that Sterling was funded by the Tobacco Institute
2 in his work?
3 A. You would have to show me. I don't know.
4 MR. WITHEY: Rather than waist time, we'll
5 submit it as an exhibit, if we can get a stipulation,
6 until we have it here.
7 Your Honor, I'm sure we could find the
8 reference to the Tobacco Institute and show it to
9 Mr. Biersteker and we can reach a stipulation on it.
10 THE COURT: Okay.

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11 MR. WITHEY: Thank you, your Honor.
12 THE COURT: We'll take about 10 minutes. Same
13 rules apply, don't talk about the case among yourselves.
14 MR. BIERSTEKER: May I have a two minute
15 summary before we break.
16 THE COURT: Yes. And thank you for the time
17 you have been with us.
18 The parties are now afforded an opportunity to
19 speak with you about the testimony that has just been
20 given. This is not evidence but an opportunity for the
21 parties to comment on the evidence.
22 Mr. Biersteker will speak with you first.
23 MR. BIERSTEKER: Ladies and gentlemen,
24 Dr. Wecker made a simple point. The simple point was
25 this:

4312
1 Statistically, if you want to isolate the
2 effect of one factor, you have to take into account other
3 factors that influence the outcome. That's true for
4 smoking and mortality. That's true for the effect of the
5 defendants' conduct on the smoking behavior of the
6 participants in the plaintiff's trust funds.
7 And if you don't do that, if you don't take
8 those other factors into account, you are going to end up
9 with an unreliable estimate. And I want you to think back
10 over the testimony that was presented here by the
11 plaintiff's experts during their case. And where was the
12 analysis that when they compared smokers and non-smokers
13 and their deaths controlled for other factors?
14 And when their witnesses stood on that stand
15 and said yep, I think the conduct of these defendants was
16 a substantial contributing factor of smoking by these
17 participants, where was the statistical evidence, never
18 mind one that controlled for other factors. It wasn't
19 there. They don't have reliable proof.
20 THE COURT: Mr. Withey.

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21 MR. WITHEY: Thank you, your Honor.
22 There is a scientific process and the
23 scientific process is very important. In this case it's
24 easy to take pot shots at the Surgeon General's report
25 that was created and generated by some of the leading

4313
1 minds and experts in this field. It has been subject to
2 any number of analyses.
3 But not once did Mr. Wecker indicate that he
4 had published his analysis that he's given you here today
5 in any article, in any medical literature, epidemiological
6 literature, biostatistical literature. He came to testify
7 not to use the scientific process.
8 The notion that the data presented and the
9 information presented by the Surgeon General's report, as
10 confirmed by the Battelle study, at least they went out
11 and did the study and published it by the Surgeon General
12 himself, that somehow there is some big disparity by the
13 deaths caused by smoking by the 19 diseases we have
14 identified because of the factors Mr. Wecker has
15 identified of whether you go to church, and whether you
16 eat dessert or not, is foreign to science.
17 The case we presented is based on science. The
18 case the defendants have presented is based on theories.
19 Thank you very much.
20 THE COURT: About ten minutes.
21 At quarter after make sure you are back in the
22 jury room. We are moving towards conclusion but we have
23 some more time today. So, keep your minds open until
24 everything is over.
25 If any of the jurors have some mission they

4314
1 need to deal with, you can approach. We are going to go a
2 little later today but the thought was we would try to
3 finish today rather than drag you back.
4 So, we'll stand in adjournment.

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5 If any of you have any issues you ought to
6 address it to the deputy clerk.
7 (Brief Recess.)
8 (The jury was returned to the courtroom and the
9 following proceedings were conducted in open court:)
10 THE COURT: If the jurors would please retake
11 their seat. I would ask the defendants to call their next
12 witness.
13 MR. LERMAN: Thank you, your Honor.
14 Your Honor, at this time we would like to read
15 selected portions from depositions that were taken of the
16 trustees.
17 THE COURT: This, again, is going to be
18 testimony given under oath before trial and then typed for
19 use at trial. Receive and consider this testimony the
20 same as if the witness were live.
21 MR. LERMAN: Ladies and gentlemen. The first
22 deposition excerpt that we are going to read, I'll be the
23 lawyer and Mr. Coughlin will be the witness for each of
24 these depositions, is a gentlemen named -- and I remind
25 you, you are under oath Mr. Coughlin -- is a gentlemen

4315
1 named Ralph Cole, who has been a trustee for the Ohio
2 Laborers District Council Ohio Contractors Insurance Fund
3 1995 as a trustee.
4 Mr. Cole is a named plaintiff in this suit. He
5 has been a participant in the fund since its inception,
6 since 1967. He is also the Business Manager, Secretary
7 and Treasurer for Laborers Local 83.
8 Mr. Cole is 53 years old and he resides in [DELETED].
9 And the date of the deposition was
10 August 12th, 1998.
11 Mr. Coughlin, I think we are starting on page
12 18.
13 A. I've got it.
14 (The deposition was read as follows:)
15 Q. Did you do anything to prepare for the deposition
16 today?

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17 A. I reviewed the complaint. I reviewed the complaint
18 and probably didn't do that as well as I should have, and I
19 looked at another copy -- I looked at a copy of a
20 deposition.
21 MR. LERMAN: Going to page 20.
22 Q. Did you review the entire document that was provided
23 to you?
24 A. I skimmed through it.
25 MR. LERMAN: Going to page 24.

4316
1 Q. When did you become a trustee for Ohio Laborers?
2 A. It was about 4 years ago.
3 Q. Do you agree with me that the way, from my
4 understanding of what you are saying is, that your role is
5 to take the contributions and get for your participants and
6 beneficiaries the most or best benefits that you can?
7 A. We --
8 MR. LERMAN: Page 27.
9 MR. COUGHLIN: I have the question.
10 THE COURT: It's at line 21.
11 A. Okay. My role is to choose the best professional
12 that I can in terms of, again, attorneys, consultants,
13 providers and administrator for this fund. Ultimately it
14 is to get the best benefit that I can get them for the
15 premium, for the best premium.
16 Q. Who does the fund rely on for that cost benefit
17 analysis?
18 A. Who does the fund rely on? Consultants.
19 Q. I believe you also said that you believed that the
20 tobacco industry pretended that smoking is not bad for you,
21 is that right?
22 A. No, what I said was that they, they pretend it may be
23 when they know that it is.
24 MR. LERMAN: Going to 46, Patrick.
25 Q. You are not aware that there is a warning label on

4317
1 packs of cigarettes?
2 A. I've heard there is, but I've never read it.
3 Q. So you don't know what it says?
4 A. No, sir.
5 Q. You just know that there is a warning on packs of
6 cigarettes?

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7 A. I've heard that there is, and I don't really know
8 that there is.
9 Q. You can't say that in the 1980s you were aware that
10 the Surgeon General had a warning on packs of cigarettes?
11 A. I can't say that.
12 Q. Fair enough.
13 Were you aware, or do you remember the
14 publicity surrounding the Surgeon General's initial
15 requirement that a warning be placed on pack of
16 cigarettes?
17 A. Can I qualify my answer? It's no, and I just never,
18 truthfully, I've never had an interest one way or the other
19 in cigarettes. So it may sound very stupid, but the answer
20 is still no.
21 Q. So you have never paid attention to whether there is
22 a warning one way or another?
23 A. Right.
24 Q. And I take it from your response, you don't really
25 pay attention to cigarette advertising one way or another?

4318
1 A. Right.
2 Q. Certainly nothing in any cigarette advertisement has
3 affected any of your decisions as a trustee of the fund?
4 A. I can't say it has.
5 Q. Do you have any reason to disbelieve the warnings
6 from the Surgeon General?
7 A. Any reason not to believe, sir.
8 Q. Sure?
9 A. No, I don't have any reason not to believe.
10 Q. Since the time that you were aware of the Surgeon
11 General's warning, have you ever disbelieved it?
12 A. No.
13 Q. Nothing hard to understand about the Surgeon
14 General's warning, is there?
15 A. I really don't know what it is.
16 MR. ROWE: Your Honor, this section, we object
17 to the reading on this based on your rulings over the
18 lunch hour.
19 MR. LERMAN: Your Honor, this doesn't deal with
20 an opinion related to the litigation. It's a factual
21 question.

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22 THE COURT: I'll overrule it, at least as to
23 that question.
24 MR. LERMAN: At 52 now.
25 Q. Let's get back to the complaint. Let me ask you to

4319

1 look at what we have marked as Cole Exhibit 1, which is the
2 complaint or the first amended class action complaint.
3 Can you look at it. I'll give you the page
4 number. Can you turn to page 82, paragraph 254 on that
5 page?
6 A. Um hum.
7 Q. It says there, until very recently plaintiffs and
8 their participants and beneficiaries had no knowledge that
9 defendants were engaged in much of the wrongdoing alleged
10 herein.
11 As you sit here today, are you aware of any
12 facts to support that allegation in this complaint as it
13 relates to your fund?
14 A. Am I aware of any facts?
15 Q. Sure?
16 A. No, sir.
17 MR. LERMAN: Go to page 56.
18 Q. And let's move down to the second sentence. It says,
19 as a result of such reliance, plaintiffs and class members
20 failed to take or would have taken action sooner to more
21 appropriately treat tobacco related injuries and diseases
22 as well as to discourage and reduce cigarette and smokeless
23 tobacco use and the costs associated therewith by
24 plaintiffs and class members, participants and
25 beneficiaries.

4320

1 As you sit here again today, are you aware of
2 any facts to support that allegation as it relates to your
3 fund?
4 A. We discussed, and I hope, and I personally hope to
5 put something in place now that encourages participants not
6 to smoke.
7 Q. I understand your answer about what you are planning
8 or thinking about planning to do now. But as

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you sit here,
9 are you aware of any facts that would support the
10 allegation that, as a result of your reliance, or the
11 fund's reliance on misrepresentations or concealment from
12 the tobacco industry, that you would have taken action
13 sooner?
14 A. No.
15 Q. You said that you would hope, or you are hoping that
16 the fund may do something in the future. Have the trustees
17 at any trustee meeting discussed any smoking cessation, any
18 smoking cessation programs?
19 A. No.
20 Q. In the entire time that you have been a trustee, have
21 the trustees at a meeting ever discussed smoking?
22 A. I can't recall.
23 Q. You don't recall any discussions about smoking?
24 A. No.
25 Q. Since you filed the complaint, have the trustees done

4321
1 anything to encourage participants not to smoke?
2 A. Other than the physicals that we provide for, no.
3 Q. Explain to me what you mean by the physical that you
4 provide for?
5 A. Well, a physical is provided for, as one of the
6 benefits, and then, obviously, with the examination from
7 the doctors.
8 Q. So you are assuming that a doctor might tell someone
9 not to smoke?
10 A. Yes.
11 Q. Anything else that your fund has done since it's
12 filed the complaint to discourage participants from
13 smoking?
14 A. No, sir.
15 Q. And I know this is close to what I've asked before,
16 but has that topic been discussed at a trustee meeting?
17 A. Not that I can recall.
18 Q. Why not?
19 A. I don't know.
20 Q. Is there any reason that your fund couldn't institute
21 some kind of preventive program to discourage participants

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22 from smoking?
23 A. I'm going to find out.
24 Q. But as you sit here today, is there anything that you
25 can think of that would prevent you, or would have

4322
1 prevented you at any time, as trustees, from initiating
2 some type of program to discourage participants from
3 smoking?
4 A. No.
5 Q. Since you filed the complaint, have the trustees done
6 anything to educate participants or beneficiaries as to the
7 effects of smoking?
8 A. No.
9 Q. Have you done anything to educate your participants
10 at all since the time you were a trustee?
11 A. No.
12 Q. Are you aware of any education that the fund provided
13 prior to the time that you were a trustees?
14 A. No.
15 Q. And again, you have been a participant of the fund
16 for 20 years?
17 A. Yeah, more.
18 Q. Are you aware of how many of your participants or
19 beneficiaries smoke?
20 A. No.
21 MR. LERMAN: Page 60, Patrick.
22 Q. If you, as a trustee, believe that smoking and
23 smoking related diseases cost your fund money, why haven't
24 you done anything since filing the complaint to educate
25 your participants to what's alleged in the complaint?

4323
1 A. No reason.
2 Q. Nothing to stop you from doing that, is that right?
3 A. Not that I know of.
4 Q. I'm going to ask you to take a look at what I've had
5 marked here as Cole Exhibit 3 and 4, which are entitled
6 Ohio Laborers District Council Ohio Contractors Association
7 Insurance Fund.
8 One appears to be dated November, 1990; one is
9 dated January 1st, 1994. Do you recognize these
10 documents?

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11 A. Yes.
12 Q. Now, let me ask you to look at page 34. Actually
13 page 33. You see F up there, benefit limitations.
14 It says coverage is not provided for services,
15 supplies, or equipment. Actually, you can strike. That
16 let me rephrase that.
17 If you skip down from F to the second little
18 paragraph there, it says, no coverage is provided for loss
19 caused by or resulting from, is that right?
20 A. Yes.
21 Q. So the things listed below there are excluded from
22 coverage?
23 A. Yes.
24 Q. On page 34 there, number 16?
25 A. Um-hum.

4324
1 Q. Can you just read that out loud for me?
2 I'll read it out loud. It says services or
3 supplies related for the treatment of abuse of nicotine
4 from tobacco or other sources, is that right?
5 A. Yes.
6 Q. So that's excluded from coverage?
7 A. It would appear.
8 Q. Were you aware, before you just looked at that today,
9 that your plan actually excludes coverage for supplies
10 related to the treatment for abuse of nicotine from tobacco
11 and other sources?
12 A. No, sir.
13 Q. You weren't aware of that?
14 A. No, sir.
15 Q. Why not?
16 A. Ignorance.
17 Q. At the time your fund decided to participate in this
18 lawsuit, did any of the trustees raise the issue about
19 whether or not you actually cover smoking cessation or
20 nicotine replacement products?
21 A. Not to my memory.
22 MR. ROWE: Your Honor, we would object to the
23 next section based on your rulings over the lunch hour.
24 MR. LERMAN: Again, your Honor, this is a
25 factual inquiry.

4325
1 THE COURT: Overruled.

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2 BY MR. LERMAN:
3 Q. Sure, considering the allegations you have made in
4 the complaint, wouldn't you agree with me that it would
5 have been important for trustees in the fund to know
6 whether or not they are covering smoking cessation programs
7 at the time they filed the lawsuit?
8 A. Yes.
9 Q. And I take it at the meeting that you have attended,
10 since you filed the lawsuit there has been no discussion
11 about removing that exclusion?
12 A. Not to my recollection.
13 Q. Has the fund ever investigated whether there is a
14 safer cigarette on the market?
15 A. Not to my knowledge.
16 Q. If there was a safer cigarette on the market, do you
17 believe the fund would purchase it for participants?
18 A. No, sir.
19 Q. Or subsidize the purchase of it in any way?
20 A. No, sir.
21 Q. You don't believe that's something the fund could do?
22 A. I don't believe that's something we would do.
23 Q. The fund doesn't rely on the tobacco industry for
24 medical and scientific information, does it?
25 A. Not that I know of.

4326
1 Q. As far as you know, did the fund ever rely on the
2 tobacco industry for information regarding smoking related
3 diseases?
4 A. Not as far as I know.
5 Q. Or for addiction?
6 A. Not as far as I know.
7 Q. Did you ever ask any of your consultants or
8 professionals for the information they have available in
9 connection with smoking and smoking related diseases?
10 A. No, sir.
11 Q. Have you ever asked any of your actuaries, either
12 TIC, Segal, or anyone else, to do any type of cost benefit
13 analysis like that in connection with smoking or any type
14 of smoking cessation program?
15 A. No, sir.
16 Q. Is there any reason for that?

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17 A. No.
18 Q. Nothing preventing you from doing that?
19 A. No, sir.
20 MR. LERMAN: Page 83.
21 MR. ROWE: Your Honor, we object to this
22 section based on your rulings over the lunch hour.
23 THE COURT: I'm sorry?
24 MR. ROWE: We would objection to this section
25 based on your ruling over the lunch hour on investments.

4327
1 MR. LERMAN: This doesn't deal with
2 investments, it deals with availability of funds.
3 MR. ROWE: I think the particular exhibit
4 that's referenced is going to deal with investments.
5 THE COURT: I'll sustain it -- well, I'll allow
6 you to ask the question on page 84 line 13 and the
7 response to it.
8 MR. LERMAN: I'm sorry, your Honor? 84 at line
9 13?
10 THE COURT: Yes.
11 MR. LERMAN: Okay.
12 Q. With that money available, with over 90 million
13 dollars invested in the stock market, why hasn't the fund
14 done anything to initiate some type of program to prevent
15 people from smoking?
16 A. I don't know.
17 MR. LERMAN: I believe that concludes that
18 deposition, your Honor.
19 Patrick, the next deposition is in the other
20 notebook.
21 Your Honor, we are going to read the Clarson
22 deposition, which is in notebook number 2.
23 Just briefly, ladies and gentlemen. The next
24 deposition you are going to hear excerpts from is an
25 individual named Richard Clarson, who's the benefit

4328
1 consultant for the Toledo Electrical Fund since 1992.
2 Toledo Electrical is one of the named
3 plaintiffs in this lawsuit. Mr. Clarson is currently a

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4 smoker. He's 44 years old and he's self-employed.
5 Patrick, I guess we are started at page 9.
6 Q. Can you tell me briefly what your educational history
7 is?
8 A. I went through 12 years of education, 4 years.
9 Q. High school?
10 A. Yes, through high school, King College of New Jersey,
11 graduated with a Bachelor of Science in management science,
12 which is another term for business administration, and I've
13 continued my education and have passed the ten examinations
14 that are required for certified employee benefit specialist
15 designation.
16 Q. When did you start consulting for the Toledo
17 Electrical Welfare Fund?
18 A. I don't remember the precise date, but it would have
19 to be sometime in 1992, my first year there.
20 Q. So did you feel it was part of your responsibility to
21 keep up with developments in the health and welfare
22 benefits field yourself?
23 A. Yes.
24 Q. And what did you do in order to be able to do that?
25 A. Different education, periodicals, the international

4329
1 foundation membership for my employee benefit designation,
2 I do get literature from them that I would read,
3 developments that I would pick up from insurance companies.
4 Q. What other periodicals do you read besides the one
5 circulated from the international foundation?
6 A. So various professional magazines.
7 Q. Can you tell me their names?
8 A. Business Insurance, National Underwriter.
9 Q. Any others?
10 A. I mostly rely on a lot of materials from the
11 international foundation.
12 Q. And do they have various journals that they
13 circulate?
14 A. Yes, they do.
15 Q. Which ones of those do you read, if you recall?
16 A. They do a publication that is a quarterly publication
17 that goes into some in depth issues on employee

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benefits.
18 Q. Anything else that they publish that you read?
19 A. I do attend, I have been attending the international
20 foundation employee benefit conference to keep current on
21 employee benefit topics, and with those conferences comes
22 material that I acquire while I'm there.
23 Q. Is that an annual conference?
24 A. Yes.
25 MR. LERMAN: Now I'm on page 43.

4330
1 Q. There are some routine things that you do for the
2 fund, true?
3 A. I can generalize, some routine things is if the
4 trustees desire to research a planned design change, I
5 would do some plans for estimating cost, I organize
6 information for them so they can digest it, and make
7 decisions as trustee, I draft communication pieces to
8 employees.
9 Q. Now, on page 46. Do you consider it part of your
10 responsibility to look for possible cost savings to the
11 plan?
12 A. Yes, I do.
13 Q. And how is it that you go about doing it?
14 A. In the health care insurance field, for lack of a
15 description, dynamic changes, there's current changes,
16 there's current new innovations, new ideas, cost
17 containment devices. I do feel it's my responsibility,
18 should something be applicable to the fund, that I bring it
19 to the trustees attention?
20 Q. So you monitor what's going on in publications and
21 literature in the health care insurance field to keep up
22 with that sort of thing?
23 A. I keep up with periodicals, as well as my experience
24 with other clients. I do peer review with my peers in my
25 business to see what's going on there, what's going on here

4331
1 what's going on in another part of the country. It is from
2 a variety of sources that I try to keep current. A lot of

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3 it -- if a health care service provider in some capacity
4 has something they market to consultants or to brokers
5 because they know that we have access to several accounts,
6 and if there is something that's a fit -- my policy is if
7 there is something that's a fit, I would bring it to the
8 attention of any account.
9 Q. Just give me an example of some occasions where you
10 have brought something like that to their attention?
11 A. I've updated their prescription drug program so
12 they are paying what I'll call a market value instead of
13 just letting it go the way it was. If you stay on top of
14 that you get some more favorable discounting.
15 Q. As part of your work for the Toledo Fund, do you
16 attend the trustee meetings?
17 A. Yes, I do.
18 Q. Do you ever put issues on the agenda to be discussed
19 at the meeting?
20 A. Yes, I do.
21 Q. Are those ideas of your own or things that the
22 trustees have asked you to look into? How does that work?
23 A. It would be a combination of both.
24 Q. Do you smoke?
25 A. Yes, I do.

4332
1 Q. How long have you smoked for?
2 A. Probably started when I was 17, 18, I quit for two
3 years, and have picked it up again.
4 Q. Oh, so you started in 1972?
5 A. '72, '73.
6 Q. At the time that you started smoking, you were aware
7 that there were warnings on cigarette packages saying
8 smoking is hazardous to your health?
9 A. Through going through school I knew that smoking was
10 not a healthy habit.
11 Q. Were you aware when you started smoking that there
12 were warnings on the cigarette packets saying smoking
13 may be hazardous to your health?
14 A. I don't specifically recall that.
15 Q. Do you recall there being warnings on cigarette
16 packets?
17 A. Yes, I do.

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18 Q. You know they're there today?
19 A. Yes.
20 Q. But you knew at the time you started smoking that
21 cigarette smoking was not a healthy habit?
22 A. Yes.
23 Q. Did your parents tell you not to smoke?
24 A. They discouraged it.
25 Q. Are you aware that cigarettes, cigarette smoking has

4333

1 been linked to lung cancer?
2 A. Yes.
3 Q. Are you aware that there were claims that cigarette
4 smoking causes heart disease?
5 A. Yes.
6 Q. Stroke?
7 A. As related to heart disease, yes.
8 Q. How long have you known that cigarette smoking has
9 been linked to lung cancer?
10 A. Probably since before I started.
11 Q. So you believe that cigarette smoking is addictive?
12 A. Yes, I do.
13 Q. How long have you believed that for?
14 A. Hard to pinpoint a date on it. I would say probably,
15 maybe the last ten years as an estimate.
16 Q. At the time that you quit smoking in the late 70s,
17 did you think that smoking was addictive then?
18 A. I knew at that time it was a craving. I felt that,
19 you know, I could always quit, and I thought I had it
20 licked, but then there was always this urge that was there,
21 and then, like I described, I went back to it.
22 Q. You have known the entire time that you have been a
23 consultant for the Toledo Electrical Welfare Fund that
24 smoking is bad for your health. True?
25 A. Yes.

4334

1 Q. And have you known for that entire time that smoking
2 is associated with higher health care costs?
3 A. Yes.
4 Q. Have you ever looked to the tobacco industry for
5 health care information?
6 A. No.
7 Q. You said that you have known for a long time that
8 smoking is bad for your health, is that true?
9 A. Yes.
10 Q. Would you agree with me that it's common knowledge

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Source: https://www.industrydocuments.ucsf.edu/docs/hjhd0001

11 that smoking is bad for your health?
12 A. Yes.
13 Q. Were you aware of the 1964 Surgeon General's report
14 when it was published?
15 A. As a kid I recall something like that.
16 Q. Would you say it was a fairly significant event in
17 the media?
18 A. Yes.
19 Q. And then it goes on. Patrick, I think at line 10?
20 THE COURT: Line 10.
21 A. In my opinion, I was nine, I would think that it was.
22 Q. It caught your attention when you were nine, right?
23 A. Yeah, I can remember the whole thing about smoking
24 and people talking about it or whatever.
25 Q. I'm asking you what you remember now about what you

4335
1 understood in 1964.
2 A. Okay.
3 Q. About the Surgeon Generals 1964 report?
4 A. That smoking is bad for you, to generalize.
5 Q. Are you aware that the Surgeon General has issued
6 reports since that time?
7 A. No.
8 Q. Have you ever read any of them? I guess not?
9 A. No.
10 Q. Did you have any reason not to believe the Surgeon
11 General that smoking was bad for your health?
12 A. Did I have any reason to think that his report was
13 false?
14 Q. Yes.
15 A. No, I did not.
16 Q. Did anything the tobacco industry ever did make you
17 think that smoking was not bad for your health?
18 A. Not that I'm aware of.
19 Q. Did you see the tobacco company executives testify
20 before Congress?
21 A. I did not watch that on television or anything, no.
22 Q. Do you remember that happening in 1994?
23 A. No.
24 Q. You don't know the specific prevalence of smoking in
25 the fund though, do you?

4336
1 A. Not for that fund, not precisely no.
2 Q. Do you know if the fund has any information from

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3 which that could be determined?
4 A. No.
5 Q. No, they have no information or no, you don't know?
6 A. No, I don't know if they have anything in their own
7 statistics, I don't have that information.
8 Q. And I take it that you have never done an analysis on
9 how much smokers cost the fund?
10 A. I don't recall doing it.
11 Q. Have you ever heard of a document called the frank
12 statement?
13 A. Not that I recall.
14 Q. Have you ever seen anything published by or authored
15 by the tobacco industry?
16 A. Did I ever see anything authored by them, not that I
17 can recall.
18 Q. How many, what types of smoking cessation programs
19 does the program have currently?
20 A. As of today?
21 Q. Yes.
22 A. They cover the patches, the gum, nicotine gum, the
23 inhaler, any type of smoking deterrent prescribed by a
24 physician, which would include Zyban. That's all I can
25 recollect, but the intent of their coverage was to cover

4337
1 the over the counter and prescription smoking deterrents.
2 Q. And how long have those programs been in place?
3 A. That particular coverage for those smoking deterrents
4 have been in effect since January 1st, 1999.
5 Q. So it has been in place for six days, seven days?
6 A. For those smoking deterrents, yes.
7 Q. When you say that, it sounds like you are implying
8 there were other smoking deterrents available before then?
9 A. Yes.
10 Q. What were those?
11 A. It was an administrative policy or a part of the plan
12 that if a member tried quitting smoking on their own three
13 times, they would pay for -- the fund would pick up the
14 cost for a smoking deterrent.
15 Q. And how long was that program in effect?
16 A. My understanding of it, that has been in effect for
17 since I've been associated with the fund.

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18 Q. A participant had to try to quit smoking three times
19 through other methods, right?
20 A. Or, as far as I understand it, they just had to try
21 quitting smoking three times. They could use deterrents.
22 And if they wanted to try for a fourth time the fund would
23 pay for, that is my understanding of it.
24 Q. How is was it verified -- how was it verified whether
25 the person had tried three times before to quit smoking?

4338
1 A. That would be an administrative procedure by the fund
2 office. I'm guessing you could do -- if I was a member and
3 I tried three times, I'd show my receipts for patches or
4 whatever as proof, that they would possibly accept that as
5 proof.
6 MR. LERMAN: I'm on 108 now, Patrick.
7 Q. Mr. Clarson, I've handed you what's been marked as
8 Exhibit 2, which appears to be a memo from Mr. Bugaj to the
9 board of trustees in March, 92.
10 Were you working for the Toledo Fund at this
11 time?
12 A. No, I have not.
13 Q. Have you ever seen this memo before?
14 A. No, not that I can recall.
15 Q. Could you read the first paragraph, please?
16 A. The recent introduction of Nicoderm and Habitrol
17 patches as a smoking deterrent has led to a rush of
18 inquiries and claims under the prescription drug card
19 program. Nicorette gum has, until January, 1992, been the
20 most popular smoking deterrent.
21 Q. Would you read the bottom part of the document
22 starting with the underlined portion, John Davies and I
23 have discussed and reviewed this matter and recommended as
24 follows:
25 Number one; elimination of coverage of all

4339
1 smoking deterrents under the prescription drug card plan.
2 Number two, coverage of Nicorette,

http://legacy.library.ucsf.edu/tid/lnc05a00/pdf
Source: https://www.industrydocuments.ucsf.edu/docs/hjhd0001

Nicoderm,
3 Habitrol or like products under Major Medical, but only
4 after satisfactory evidence is submitted to the fund that
5 at least three other methods of smoking abatement has been
6 attempted by the individual.
7 MR. LERMAN: I'm on page 112 mow.
8 Q. The court reporter has handed you Exhibit 3. Have
9 you seen this document before?
10 A. Chance to review it?
11 Q. Sure. Do you recall having seen this document
12 before?
13 A. Yes, I have.
14 Q. When do you remember having seen it before?
15 A. Using the date on top, it was May of '98.
16 Q. Do you remember why you reviewed this document in May
17 of '98?
18 A. To the best of my recollection, I think we were
19 trying to clarify this three quitting -- three attempts and
20 do we cover this or not, and I requested this from the
21 electrical fund.
22 Q. Is it true that switching from coverage of nicotine
23 replacement products under the prescription drug card to
24 this program of requiring three attempts to quit would make
25 it more difficult to get access to nicotine replacement

4340
1 products?
2 A. To answer your question, yeah. I think it would make
3 it more difficult to obtain, clumsier or more of a process.
4 Q. Generally speaking, how does a prescription drug
5 program work if someone wants to get a medication?
6 A. Okay. What I have advised to a client that wants to
7 cover smoking deterrents with a prescription drug card,
8 when they all used to be with physicians -- when you needed
9 a prescription from a physician, you could just cover that
10 as any other qualified prescription coverage under the
11 plan.
12 It's a little more difficult now, because now
13 the patches and the gum are available over the

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counter.
14 And my advice to a client would be to help monitor that so
15 that you don't get abuses. Because if you just let it
16 cover by a card, a guy could technically fill up a
17 shopping cart with these things and get it paid for if you
18 covered it directly on their card.
19 The administrative policy is to request a prior
20 authorization. So the system for the administration of
21 the drug card would actually have it as not covered, but
22 through the prior authorization, say I would like to get
23 some smoking deterrents, you can authorize that purchase.
24 And this way you can monitor and flag abuses.
25 Q. And is it your understanding that the benefits for

4341
1 smoking cessation products did not change between 1992 and
2 January 1st, 1999?
3 A. To the best of my knowledge, that's correct.
4 Q. Do you remember making a presentation about wellness
5 programs in May of 1995?
6 A. Yes, I do.
7 Q. And what were the different options that you
8 presented to the fund or to the trustees in terms of
9 smoking deterrents?
10 A. By reviewing this discussion guide?
11 Q. Yes?
12 A. I think I talked about allowing the smoking
13 deterrent, something available through the Toledo Heart
14 Institute and the acupuncture and the self-help Quit for
15 Life program offered through HealthCare strategies.
16 Q. Did you believe at this time that the funds should
17 adopt a wellness program including smoking cessation?
18 A. That's not my decision for this health and welfare
19 fund, that's up to the trustees.
20 Q. Well, you recommended them various cost-saving
21 measures, is that true?
22 A. Yes, I did.
23 Q. And you believe the that smoking was costing them
24 money?

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25 A. As with all lifestyle choices, that would cost any

4342

1 plan money, yes.
2 Q. So was why is it you were not advocating them doing
3 something about it?
4 A. What I recall from putting together this package or
5 this type of program for any client, these are options on
6 how -- the request to me was to bring them information on
7 different types of wellness programs. I did my research
8 and put together a variety addressing the smoking,
9 addressing the stress, addressing weight loss or stress or
10 whatever, provide them information with what other programs
11 are doing around the country from the Foster Higgins
12 survey, gave them descriptions of the programs, and also
13 did an estimate, a reasonable estimate on should they adopt
14 one of these programs how much it might cost them.
15 To answer, get back to your question whether I
16 would make a recommendation for this, if they asked me, I
17 would then voice my opinion. I view that the trustees are
18 sophisticated enough to understand what the issues are
19 with wellness and their beliefs and desires, what they
20 want to do at that time. I felt my responsibilities were
21 met by providing them with this information.
22 I do remember, because as a professional
23 opinion that I would say to all clients is that as far as
24 these different types of wellness programs it's very
25 difficult to track a claim that doesn't happen.

4343

1 If somebody reduces their weight and does not
2 get a heart attack, it's hard to measure that. However,
3 you can look at your group as a whole, and if you
4 implement all these programs, and if you saw all your
5 utilization or experience go down and if you can believe
6 calculation, because health care trends still

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continue to
7 rise and the offset of wellness programs that, you know,
8 you have to kind of buy into those type of actions, but it
9 is very difficult for me to say if you put in this program
10 for 15 hundred people that it's going to save you X amount
11 of dollars.
12 Q. Has the fund ever -- have the trustees ever asked you
13 to do a cost benefit calculation on smoking cessation
14 programs?
15 A. When you say cost benefit analysis, asking that, do I
16 interpret your question meaning if they put in smoking
17 cessation products how much will that save us?
18 Q. Yes.
19 A. No, that's a difficult number for me to determine.
20 Q. But they have never asked you to do that, have they?
21 A. As a specific question to me, I don't recollect that.
22 Q. Do you recall whether the fund adopted any of these
23 programs that you offered as options?
24 A. My recollection was that they did, the Personal Best
25 newsletter.

4344
1 Q. And where does that fit on this menu? I don't see
2 that as one of the options you were discussing?
3 A. That's on page 3, it's the OHTE 0004831. Educational
4 mailings.
5 Q. Under H where it says promotes wellness through easy
6 to read newsletters offering advice on exercise, diet and
7 behavior?
8 A. Yes.
9 Q. So the fund chose not to change its smoking deterrent
10 program, right?
11 A. That's correct.
12 Q. And they chose not to offer this program that you
13 have listed here as acupuncture through the Toledo Heart
14 Institute?
15 A. To the best of my knowledge, yes.
16 Q. And they chose not offer the Quit For Life self-help
17 program?
18 A. I believe they did not.
19 Q. Instead they chose to send out a newsletter, correct?

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20 A. Yes.
21 Q. I think on the addendum to this, which is at page
22 OHTE 0004835. it lists the cost of these programs?
23 A. Yes.
24 Q. What would have been the annual cost for covering
25 smoking deterrents, that is the nicotine patches or

4345
1 Nicorette under prescription drug card program?
2 A. My estimated cost, if they want to cover cost for
3 employees, would be $6,000. My estimated cost for
4 employees and dependents would be $13,000.
5 Q. Now, the court reporter has handed you Exhibit Number
6 5, can you tell me what that is?
7 A. Balance sheet for the fund as of April 30th, 1995.
8 Q. April 30, 1995 was a month before this trustee
9 meeting, correct?
10 A. Yes.
11 Q. Can you tell me what the reserve was for the fund in
12 that year at that time?
13 A. Balance sheet demonstrates assets of about 6.5
14 million in the fund.
15 Q. So the fund had 6.5 million at that time in assets
16 that were not being set aside to pay current benefits,
17 true?
18 I'm sorry.
19 They had 6 million in extra assets, correct?
20 A. I'm not sure if I could determine from this financial
21 statement.
22 Q. The financial statement indicates that they have net
23 assets in excess of liabilities of 6.5 million dollars,
24 right?
25 A. This balance sheet does say that.

4346
1 Q. And the trustees chose not to spend $13,000 to pay
2 for patches and Nicorette, true?
3 A month later, true?
4 A. No, they decided not to cover smoking deterrents.
5 Q. Now, the three attempt rule, that was a major medical
6 coverage, true?
7 A. That's right.
8 Q. So at that point, after 1992, any

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prescription for
9 any nicotine replacement product would have been covered
10 under major medical and not prescription?
11 A. Right, so setting this up administratively, the card
12 program itself did not cover the smoking deterrents. If
13 you were going to get them covered it would be under the
14 major medical. I learned sometime, it might have been late
15 '96 or so, that I found out that someone had a smoking
16 deterrent paid for through the card program, and since I
17 set up that plan administratively I said that doesn't
18 appear to be correct and I researched the issue.
19 I discovered the issue that some participants
20 were indeed getting smoking deterrents through the
21 prescription card program. The issue I had was, since the
22 policy was not to cover those smoking deterrents through
23 the card program, that the prescription card vendor,
24 RESTAT, was paying those in error. And I think that this
25 money, whether it was at this meeting or another one, this

4347
1 was the meeting of February 27th I relayed that issue to
2 the trustees.
3 Q. And did RESTAT offer a refund?
4 A. At a later time they did refund that money.
5 Q. The fund instructed RESTAT to no longer pay for
6 nicotine replacement products?
7 A. Yes.
8 Q. So the people who had been getting nicotine
9 replacement products through RESTAT up to this point were
10 cut off?
11 A. That's right.
12 MR. ROWE: Your Honor, the materials on pages
13 138 and 139, 140 we believe are not proper under the
14 court's lunch time rule.
15 THE COURT: I'll sustain the objection to 138.
16 And the top question and answer on 139, and the bottom
17 question and answer on 139 and 140.
18 MR. ROWE: Thank you.
19 MR. LERMAN: All right, your Honor.

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Are we now
20 on 144 then?
21 THE COURT: Yes.
22 BY MR. LERMAN:
23 Q. During the time that you were a consultant to the
24 Toledo Electrical Fund, do you recall the fund ever sending
25 out any information regarding the availability of smoking

4348
1 cessation benefits by way of nicotine replacement products?
2 A. I have no recollection of them sending out -- I don't
3 know if they sent out communication on this or not. Even
4 this amendment was signed right about the time I started
5 with Findlay Davies, and I'm not sure if I --
6 Q. But you don't recall since that time anything being
7 sent out with respect to this subject?
8 A. I don't recall.
9 Q. And you yourself didn't know even as of May of 1998
10 whether or not the fund covered nicotine patches?
11 Is that true?
12 A. Yes.
13 Q. Okay. Well, in preparation for that trustee meeting,
14 and the presentation you were going to be making there,
15 what did you do?
16 A. For smoking information I searched the Internet. I
17 was passed along a piece of information from the Laborers
18 International Union which I wound up using. I met with the
19 people from Harbor Behavioral. I went to a couple
20 pharmacies myself to research the over-the-counter
21 medications, contacted HealthCare Strategies for any
22 information they had. I contacted the prescription drug --
23 prescription benefit manager with respect to how to
24 administer the programs and if there were any other smoking
25 deterrents out there that I was missing. Off the top of my

4349
1 head that's all the sources I can think of right now.
2 Q. Those were all things you could have done back to
3 1992, correct?

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4 A. The way I work is I work on directives from the
5 trustees.
6 Q. Right. And they had not asked you to do any of those
7 things, other than on the occasions that we have already
8 discussed?
9 A. That's correct.
10 Q. But had the trustees asked you back in 1992 to
11 evaluate whether or not the smoking cessation benefits
12 should be expanded, you could have done these same projects
13 back then, true?
14 A. Yes, true.
15 Q. Can you describe for me the various options that you
16 laid out for the trustees for smoking cessation programs?
17 A. Talked about smoking cessation workshop, a self-help
18 program, and pharmaceutical aids.
19 Q. And was the option of a smoking cessation workshop --
20 how much would that have cost?
21 A. The cost for that workshop, from information I
22 received from Harbor, would have been $49 per participant,
23 but they need at least a minimum of 10 participants taking
24 them up on the program.
25 Q. So it would be basically $50 for whoever decided to

4350
1 participate in the workshop, correct?
2 A. Yes.
3 Q. Was that workshop something that was implemented by
4 the fund?
5 A. No, it was not.
6 Q. What about the self-help program, how would how much
7 would that have been?
8 A. The self-help kit, that would have cost $200 per kit.
9 Q. Was that something implemented by the fund?
10 A. No, it was not.
11 Q. The nicotine replacement program, I see that there's
12 a number of options listed here, the patches, the gum,
13 nasal spray, inhalers -- that may be the same as nasal
14 spray -- and the Zyban pills.
15 Which one of those had been implemented by the
16 fund?
17 A. All of those.

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18 Q. Well, did the fund have enough money to pay for $50 a
19 person for the --
20 A. A trustee could look at this a different way.
21 Q. -- for the counseling program that was suggested or
22 that was an option to them?
23 A. My opinion only, what can go through a trustee's
24 mind, and using this particular fund as an example, I did a
25 financial review at the end of October because the

4351

1 contributions were less than the benefits and the
2 administrative expenses they were paying out. Now a
3 trustee could look at this long range. If that trend
4 continued, would the reserves of that fund eventually
5 diminish? Yes, it would. Would things turn around? That
6 could happen.
7 So I know they requested me to look at those
8 finances to determine what was causing the problem of
9 their depletion of assets, and in this type of industry,
10 trade, it's based on the construction trades, it's based
11 on the employment, I don't know what the forecast is for
12 their future employment, but these type of building trades
13 have fluctuations where there is high employment. And
14 high unemployment, as the contributions to the fund are
15 based on hours worked, the money trickles down when
16 there's a period of unemployment.
17 There have also been past trends that during
18 that period of unemployment your medical expenses go up
19 because now guys are off and they can have things attended
20 to that they didn't have time to before when they were
21 working when employment was high. So there's other
22 factors that go through my trustee's mind on how they
23 spend the assets, so that's why I feel like it's not my
24 place to say, gee, you can afford this or you can't.
25 Q. Do you have an estimate of how much Viagra

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costs the

4352

1 fund per year?
2 A. That was implemented not that long ago. I would have
3 to research through the prescription drug data to determine
4 how much that has been costing based on actual experience.
5 Q. You don't have any estimates of that?
6 A. I think it's $12 a pill.
7 Q. The fund could have chosen no to fund Viagra and to
8 fund more smoking cessation programs, true.
9 A. They could -- the trustees can determine to cover or
10 not cover any benefits they want.
11 Q. The trustees have total discretion to cover benefits
12 as they see fit, correct?
13 A. I'm sorry, can you repeat that?
14 Q. The trustees have discretion to decide what the mix
15 of benefits will be for the fund, correct?
16 A. Yes, they do.
17 Q. At the top of that page, page 4 of Exhibit 11, it
18 says, in April, 1996 the Agency for Health Care Policy and
19 Research, an arm of the US Department of Health and Human
20 Services, published guidelines on smoking cessation for
21 clinicians, smoking cessation specialists, consumers and
22 health insurance policy makers.
23 Were you aware of that document in 1996?
24 A. No, I was not.
25 Q. Did anything the tobacco industry do prevent you from

4353

1 researching and look at that document?
2 A. Did the tobacco industry stop me from researching
3 this if I want to?
4 Q. Yes?
5 A. No, they did not.
6 Q. If you turn over to page 6 of this document there is
7 a heading, How Administrators Can Get Involved. And under
8 that do you see the bullet that says, conduct claims
9 analysis to determine the impact tobacco use has on the
10 physical health of the fund, do you see that?
11 A. Yes, I do.
12 Q. Do you know if the administrator of the Toledo fund
13 has ever conducted a claims analysis to

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determine the
14 impact tobacco use has on the fiscal health of the fund?
15 Well, do you know if they have ever done that?
16 A. I'm unaware of them doing that analysis.
17 Q. Down at the bottom of that page there is another
18 heading called how trustees and insurance purchasers can
19 help. And one of the bullets, the second bullets there
20 says, require clinicians with whom the fund has a
21 contractual relationship to ask about the patient's smoking
22 status and include it as part of the patient's confidential
23 vital signs record. Do you know if the Toledo Electrical
24 Welfare Fund requires clinicians to ask about the patient's
25 smoking status?

4354
1 A. Clarify that, like how they would they require?
2 Q. Well, do they put anything in their contracts with
3 preferred providers or anyone that requires them to ask
4 about smoking status of the participants?
5 A. Their contracts for and any type of contractual
6 relationships are handled through -- for example, they have
7 a PPO program, and a PPO firm does that contracting. And
8 it's up to the fund whether they want to contract with that
9 PPO or not.
10 Q. Does the fund make any attempt to get the PPO to
11 require that?
12 A. I don't know. I'm unaware of any.
13 Q. Up until now the fund has not distributed educational
14 materials on smoking prevention, has it?
15 A. I know there's other aspects of the industry that
16 when I met with Harbor I became aware of. They get
17 involved in the training of apprentices of their program.
18 If there's any other educational materials that they are
19 provided, I can't speak for that. I can only speak for
20 what I'm familiar with the trust fund, but there are other
21 avenues that enter into trustees' decisions. Could be
22 things I'm unaware of. But the actual trust

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fund did not
23 send out educational materials to my knowledge.
24 Q. The next bullet point says that, where applicable,
25 hold health care provider networks, dental and physician

4355
1 PPOs, HMOs, et cetera, accountable by requiring them to
2 report on the extent to which they assist patients on
3 smoking cessation. Do you know if the fund does this?
4 A. To the best of my knowledge, they do not do that.
5 Q. The trustees never expressed to you a desire to
6 revamp the smoking cessation programs until this fall,
7 true?
8 A. That's correct.
9 Q. Do you know if the trustees could offer a lower
10 deductible to non-smokers in the fund?
11 A. I don't know if they can. We talked about this
12 previously. I would have to determine the legality, make
13 sure there is no discrimination issues with that. From my
14 experience that would be a tough thing to implement. How
15 do you tell who's a smoker who's a non-smoker, how do you
16 know? What do you do for someone who goes in, has access
17 to the health plan, they say I quit yesterday. I think
18 it's a tough thing to administer and to police.
19 Q. Do you recall what you concluded from that survey
20 with respect to the relative generosity of the Toledo
21 fund's benefits compared to other funds?
22 A. I thought, in my opinion after doing the survey, the
23 survey does not get into that comprehensive depth. It was
24 very general, just to get some basics down. I didn't beat
25 this one to death like you can do or some firms do when

4356
1 they conduct this type of survey.
2 My opinion, I thought the electrical plan with
3 their distribution of benefits had a very attractive
4 program compared to other funds.
5 At this time on May 20th of '96 they did have a

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6 week point in this plan that concerned me as consultant.
7 Q. What was that?
8 A. Their plan of benefits paid for under the base plan,
9 70 days of inpatient, then it would roll to major medical
10 where you are covered for $100,000. So depending on what
11 the element was, that could be an overall low maximum
12 limit.
13 It could be someone else's opinion, as you look
14 at that plan, if somebody really gets wiped out and has a
15 million dollar claim, this fund could cut off at 275,
16 maybe 350, depending on how much the 70 inpatient days
17 would cost. But I thought it was an overall low limit in
18 the plan.
19 Q. Does the fund require mandatory second surgical
20 opinions?
21 A. The updated version of second surgical opinion
22 program.
23 Q. What does that mean?
24 A. When you say mandatory second surgical opinion, to me
25 that refers to here's a list of outpatient procedures. If

4357
1 you're going to get one of these procedures, you have to
2 get a second opinion.
3 The updated version is we have a list of
4 outpatient procedures, you call the utilization review
5 firm, they make the determination if you need a second
6 opinion or not.
7 MR. LERMAN: Your Honor, the designations on
8 222 and 223 and 224 through 225 I would object to on
9 relevance grounds.
10 MR. ROWE: Your Honor, the implication of some
11 of the other readings is we are not doing the right thing
12 not to save money on the plan.
13 THE COURT: I'll allow it.
14 MR. LERMAN: Your Honor, starting on page 222
15 at line 2.
16 Q. Does the fund require that certain surgeries be done
17 on an outpatient basis rather than in-patient?

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18 A. Basic premise of that plan is necessary medical
19 conditions unless otherwise specified by the plan.
20 THE COURT: Let me ask, do you need the whole
21 portion.
22 MR. LERMAN: Your Honor, we asked a lot of
23 questions about what the plan does, and the plan does all
24 these things. I think it is extensive, I think it makes
25 a point, if we could.

4358
1 THE COURT: Go ahead. Why don't you go through
2 that question again.
3 BY MR. LERMAN:
4 Q. Does the fund require that certain surgeries be done
5 on an outpatient basis rather than inpatient?
6 A. The basic premise of that plan is medical necessary
7 conditions unless otherwise specified by the plan, and it
8 has to be an appropriate setting and appropriate procedures
9 as determined by the utilization review firm.
10 Q. Are all cases referred to the utilization review
11 firm?
12 A. A participant is supposed to call on any inpatient
13 stay and a participant is to call on the outpatient list,
14 and over time the evolution of the way the delivery system
15 works, a lot of the providers usually call to make sure
16 that they are following all precertification utilization
17 review requirements.
18 Q. What is the utilization.
19 MR. McNAIR: Excuse me, your Honor. Perhaps
20 Mr. Lerman would skip to page 223, line 24. I think that
21 would make the point as well.
22 MR. LERMAN: Thank you, Mr. McNair.
23 May I your Honor?
24 Q. I understand that, but they make that judgment rather
25 than the fund making that judgment?

4359
1 A. Yes, they do.
2 Q. How long has the firm had a participating
3 prescription drug program?
4 A. By participating you mean?
5 Q. How long have you had like RESTAT?
6 A. A card.

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7 Q. What do you consider RESTAT, is that a prescription
8 drug card program?
9 A. Yes, prescription drug manager style. As far as I
10 can remember, they had PCS prior to RESTAT.
11 Q. Does the fund have current review of hospital stays?
12 A. Yes, they do.
13 Q. Who does that?
14 A. HealthCare Strategies.
15 Q. Does HealthCare Strategies also do precertification
16 Of elective hospital admissions?
17 A. Yes, they do.
18 Q. Do they do discharge planning?
19 A. Yes, they do.
20 Q. Do they do individual case management for high cost
21 problems?
22 A. Yes.
23 Q. Do you have a mail order drug program?
24 A. Yes.
25 Q. Who's that through?

4360
1 A. IPS, Immediate Pharmaceutical Services.
2 Q. How long has that program been in effect?
3 A. IPS or mail order?
4 Q. Mail order?
5 A. Since I started working on the fund.
6 Q. Was there someone before IPS?
7 A. Yes.
8 Q. Does the firm have generic drug incentives, or the
9 fund, I'm sorry?
10 A. Yes, they do.
11 Q. How long have they been engaging in that?
12 A. Since I can remember.
13 Q. Did you hear that they added ammonia to tobacco to
14 enhance nicotine?
15 A. That I don't know.
16 Q. You never knew about that?
17 A. Not the ammonia.
18 Q. You were asked about the educational materials that
19 were provided to the beneficiaries. Did you mention the
20 Personal Best magazine or newsletter; is that correct?
21 A. Yes.
22 Q. You were asked by Miss Marchant whether you recall
23 whether information was given to those beneficiaries about
24 smoking or smoking habits or smoking cessation. Were those
25 articles -- excuse me. Did the Personal Best magazine

4361
1 contain information about smoking or smoking

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cessation, to
2 the best of your knowledge?
3 A. Yes, it did.
4 Q. And that was sent -- how often was that sentence out
5 Personal Best?
6 A. I think it is sent out every other month.
7 MR. LERMAN: Your Honor, that concludes the
8 deposition of Mr. Clarson.
9 With the court's permission we would like to
10 read Mr. Nicely's deposition, which is -- this is the
11 short deposition, your Honor, shorter.
12 MR. COUGHLIN: Much shorter than that last one.
13 THE COURT: Again, this is testimony you will
14 receive and consider as if the witness were here
15 testifying live.
16 MR. LERMAN: Ladies and gentlemen. Christy
17 Nicely was a trustee for the plaintiff Ironworkers Local
18 Union 17 Insurance Fund from 1973 to 1975. Mr. Nicely's a
19 former smoker. He lives in [DELETED]. And this
20 deposition was taken on August 20th, 1998.
21 MR. ROWE: Your Honor, we would like the record
22 to reflect that was a predecessor fund to one of the named
23 funds. I would also like to clarify for the jury that he
24 worked for 25 years after 1975 as a trustee for funds in
25 West Virginia, so that they could understand when he gets

4362
1 asked questions about funds he has worked for, sometimes
2 he's saying Ohio and sometimes West Virginia.
3 THE COURT: Why don't you go on.
4 MR. LERMAN: Page 3 line 8.
5 Q. Would you state your full name for the record?
6 A. Christy M. Nicely. N-I-C-L-E-Y.
7 Q. And Mr. Nicely, what is your current home address?
8 A. [DELETED].
9 Q. And you were a management side trustee?
10 A. Yes.
11 Q. So if I understand you correctly, about 25 years ago
12 you served as a trustee for about two or three years with
13 Local 17, right?
14 MR. COUGHLIN: What page are you on?

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15 MR. LERMAN: Page 9, Patrick.
16 A. Yes.
17 Q. Okay. And then after you left that position, you
18 became a trustee for the Local 550 and Local 549 funds and
19 you have served in that capacity up until last year?
20 A. Yes.
21 MR. LERMAN: Page 14.
22 MR. ROWE: Objection, your Honor. This is an
23 ambiguous question because it is unclear whether it refers
24 to the Ohio or West Virginia funds.
25 THE COURT: I'll overrule it.

4363
1 MR. LERMAN: At line 16 of it.
2 Q. Okay. In terms of what health care coverage would be
3 provided by the funds, wasn't that a decision that the
4 trustees made?
5 A. No, we rubber stamped what the union said they wanted
6 for coverage.
7 Q. Have you ever been a smoker?
8 A. Yes, at one time.
9 Q. When did you quit smoking?
10 A. Oh a long time ago. I can't tell you precisely, I
11 guess 20 or 30 years.
12 Q. Did you quit cold turkey?
13 A. Yes.
14 Q. Why did you quit?
15 A. I found that every time I had a problem I had to
16 light up a cigarette in order to solve it. So I decided
17 that was kind of dumb and it was time to quit.
18 Q. Did either of your parents ever talk to you about
19 smoking?
20 A. No, no. That was long before it was as important as
21 it seems to be.
22 Q. Up until the time you quit smoking, do you ever
23 recall anyone telling you that you should not smoke because
24 it was bad for your health?
25 A. No.

4364
1 Q. You have heard over the years various people say that
2 cigarette smoking is generally not good for a person's
3 health?
4 A. Yea, it's in the headlines all the time.
5 Q. Do you recall back in 1964 that the Surgeon General

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6 of the United States issued a report on smoking and health?
7 A. I would guess it's in the headlines someplace, but
8 beyond that it's good enough for me.
9 Q. What do you mean by it's good enough for me?
10 A. Well, that suggested that it's common knowledge.
11 Q. So, when the Surgeon General first issued his report
12 back in '64 regarding smoking and health, would you say you
13 were inclined to believe what he said about smoking and
14 what it could do to you?
15 You can go ahead and answer the question.
16 A. Yes, the headlines are attention getting.
17 Q. And I understand it got your attention, but did you
18 tend to believe the Surgeon General when you heard his
19 report about smoking and health?
20 A. Yes.
21 Q. I believe they started putting warning labels on
22 packages of cigarettes in the late 60s or early 70s. Do
23 you recall whether you quit smoking before that time?
24 A. No, I do not.
25 Q. But you don't recall seeing warning labels on

4365
1 packages of cigarettes when you were a smoker?
2 A. Yes, I don't remember.
3 Q. What about on advertisements and bulletin boards, do
4 you recall over the years seeing warnings on those ads?
5 A. No.
6 Q. Do you know now there are warning labels on packages
7 of cigarettes?
8 A. Oh, certainly.
9 Q. And this isn't something you learned just recently?
10 A. Oh, no.
11 Q. Would you say you've known for the last 20 years that
12 there were warning labels on cigarettes?
13 A. I wouldn't put a the number of years on it, but I
14 know it's been there for a long time.
15 Q. You've known that there were warning labels for a
16 long time?
17 A. Yes.
18 Q. And would it be fair to say that you know cigarette
19 smoking is harmful to your health?

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20 A. Yes.
21 Q. You tell me. Would you say that you have known that
22 cigarette smoking is bad for your health for the last 20
23 years?
24 A. I would say increasingly emphasized. If you had to
25 pick a number, I would say ten years.

4366
1 Q. But you had heard before ten years ago that cigarette
2 smoking could be bad for your health?
3 A. The newspaper headlines seem to suggest that, yes.
4 Q. In other words, you were aware that people were
5 saying cigarette smoking can be bad for your health 20
6 years or more ago?
7 A. The only thing I can answer that is the headlines
8 were indicating that the Surgeon General putting a label on
9 cigarettes to indicate that was the situation.
10 Q. So you remember headlines in the newspaper that you
11 read telling you that the Surgeon General was ordering that
12 warnings labels be put only packages of cigarettes because
13 of their health effects?
14 A. Yes.
15 Q. Do you think you tried to get people to quit smoking
16 before five years ago?
17 A. No, not particularly. I mean, only as the emphasis
18 has grown have I agreed with the emphasis.
19 Q. So looking back 10 or 20 years ago, do you recall in
20 that time period trying to get a friend or family member or
21 associate to quit smoking?
22 A. No.
23 MR. ROWE: On this next section, your Honor, we
24 would object as an ambiguous question and does not deal
25 with the Ohio --

4367
1 THE COURT: Which page.
2 MR. LERMAN: Page 41, your Honor, starting with
3 line 25.
4 THE COURT: I'll sustain the objection.
5 MR. LERMAN: Your Honor, the objection seems to
6 include the fund at issue in this case.
7 THE COURT: I think.

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8 MR. ROWE: That's the point.
9 THE COURT: It's too lacking in specificity.
10 Go on to page 45.
11 Q. Do you think that the health and welfare funds on
12 which you have served as a trustee should provide smoking
13 cessation benefits to participants?
14 A. I just don't have an opinion on it.
15 Q. You have never give it much thought one way or the
16 other?
17 A. No, no.
18 Q. Looking back on your time as a trustee and knowing
19 everything that you know about smoking, is there anything
20 you would have done differently?
21 A. No.
22 Q. Do the Local 550 and 549 currently distribute any
23 smoking cessation information to participants?
24 MR. ROWE: Objection to the irrelevance of the
25 West Virginia fund.

4368
1 THE COURT: Disregard the last question, I'll
2 sustain it.
3 MR. LERMAN: I'm going to page 47.
4 Q. Would you agree with me that based on your own
5 personal experience and knowledge, no matter what you tell
6 them and no matter what you give them, some people are
7 going to keep smoking anyway?
8 A. Yes. Some people will smoke anyhow. Like I've got a
9 couple employees that fit that category.
10 Q. Do you think it's common knowledge what smoking
11 cigarettes can do to you?
12 A. Yes.
13 Q. Do you think people have generally known for some
14 time what smoking cigarettes can do to their health?
15 A. Yes.
16 Q. Do you think you were addicted to cigarettes back
17 when you were a smoker?
18 A. I don't know. The fact that I could quit suggests
19 that I wasn't.
20 Q. So you would agree with me then that at least some
21 people who smoke cigarettes aren't addicted?
22 A. Are not addicted?
23 Q. Yes?
24 A. Right. I would say, maybe just a social

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habit.
25 Q. Smoking cigarettes may be a social habit as opposed

4369
1 to an addiction?
2 A. Yes.
3 Q. But what the tobacco companies or tobacco executives
4 said over the years really hadn't made much difference to
5 you over the years, has it?
6 A. No.
7 MR. ROWE: Your Honor, I again object to the
8 next section.
9 THE COURT: What page?
10 MR. ROWE: 52 line 21 carrying over to page 53
11 and 54. There is no way to tell whether it is the Ohio
12 funds or West Virginia funds.
13 MR. LERMAN: These questions certainly include
14 the Ohio funds, it's in the predicate.
15 MR. ROWE: But the witness could have been
16 answering on his West Virginia experience to the exclusion
17 of Ohio, and there is no way to know.
18 MR. LERMAN: Counsel was there, your Honor.
19 This is --
20 THE COURT: I'll overrule it. Overruled.
21 BY MR. LERMAN:
22 Q. Back when you were a trustee of these various health
23 and welfare funds, did any of the boards or funds for which
24 you worked ever do anything to investigate the possible
25 harmful effects of smoking cigarettes?

4370
1 A. No.
2 Q. Do you know whether any of the funds for which you
3 were a trustee ever conducted any studies to determine what
4 percentage of its participants were smokers?
5 A. No, I do not. I don't recall any such inquiry.
6 Q. To the best of your knowledge, no such study was
7 done?
8 A. Yes.
9 Q. To the best of your knowledge, none of the funds that
10 you ever served on ever studied what percentage of its
11 health care claims were related to smoking related

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12 illnesses?
13 A. That's a long question. The answer is yes, I don't
14 recall. I don't believe any studies were suggested.
15 Q. You don't recall any of the funds on which you served
16 ever studying even what percentage of the participants were
17 smokers?
18 A. Yes, I never heard of such a study. That's pretty
19 obscure.
20 Q. I'm sorry, I didn't understand.
21 A. I said that's a pretty obscure question.
22 Q. Why do you think it's obscure?
23 A. Well, so many other things that are more important.
24 Q. There were more important things for the trustees of
25 these funds to study than smoking?

4371
1 A. Yes.
2 Q. Smoking just wasn't high enough on the priority list?
3 A. Yes, that's right.
4 Q. No one asked you for your date of birth?
5 A. Oh.
6 Q. I don't think?
7 A. Okay. September 24th, 1911, long time ago.
8 Q. Mr. Nicely, you were a trustee for three different
9 health and welfare funds over a period of 25 years?
10 MR. ROWE: We object to that, your Honor.
11 THE COURT: What page?
12 MR. LERMAN: Page 59, line 11.
13 MR. COUGHLIN: Let's just read it let's go.
14 MR. ROWE: I'm sorry.
15 BY MR. LERMAN:
16 Q. Mr. Nicely, you were a trustee for three different
17 health and welfare funds over a period of 25 years?
18 A. No, I guess you could say two, Cleveland and Canton.
19 Q. You were a health and welfare fund trustee over a
20 period of approximately 25 years?
21 A. Yes.
22 Q. You have had a lot of experience as a trustee?
23 A. I would say so.
24 Q. And then page 61, Patrick?
25 A. Got it.

4372
1 Q. That's your personal opinion you've just given us,

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2 not your opinion though sitting as a trustee?
3 A. That's a personal opinion, yes.
4 Q. Over the years that you were a trustee you relied on
5 your personal opinion in making decisions as a trustee,
6 right?
7 A. Certainly.
8 MR. LERMAN: That's the end of that deposition.
9 THE COURT: And I understand that's the last
10 one.
11 MR. LERMAN: Well, if we could we would like to
12 submit the rest, your Honor.
13 THE COURT: Do you have any objection to
14 submission of those in a written form with the opportunity
15 of the parties to comment at final argument?
16 MR. ROWE: No objection, as long as we could
17 submit to you, your Honor, the objections we have to
18 certain portions and work that out.
19 THE COURT: Okay.
20 With that, does the defendant have any other
21 witnesses?
22 MR. LERMAN: Your Honor, I do have a submission
23 I would like to make.
24 MR. COUGHLIN: Are you going to read those two
25 admissions. You are going to read those admissions?

4373
1 MR. LERMAN: I would like to read two
2 admissions.
3 MR. COUGHLIN: That's fine, your Honor.
4 MR. LERMAN: And it would get -- if we could
5 have a two minute summation at the close of this I would
6 appreciate that as well.
7 Ladies and gentlemen, I'm going to read two
8 answers that the plaintiffs have given during the course
9 of the litigation to questions that the defendants
10 submitted to them, which are called requests for
11 admissions.
12 We requested the following:
13 Request for admission number 138 CTR and Ohio
14 State University co-funded scientific research projects

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15 that resulted in the publication of at least nine
16 scientific articles during the period 1954 to 1997 and the
17 response was:
18 Plaintiffs admit that CTR and Ohio State
19 University co-funded scientific projects that resulted in
20 the publication of a number of scientific articles during
21 the period 1989 to 1991.
22 Then inquiry for admission number 221 asked:
23 The 1964 report of the Advisory Committee to
24 the Surgeon General cited 39 articles resulting from
25 scientific research projects funded by CTR.

4374
1 And the response was: Plaintiffs admit that
2 the 1964 report of the advisory committee to the Surgeon
3 General cited a number of articles resulting from research
4 projects funded by CTR.
5 Request for admission number 223:
6 At least 296 articles resulting from scientific
7 research projects funded by CTR have been cited in the
8 annual Surgeon General's reports on smoking through 1997,
9 and in the 1964 report of the advisory committee to the
10 Surgeon General.
11 And the response: Plaintiffs admit that the
12 Surgeon General's reports on smoking have cited a number
13 of articles resulting from research projects funded by
14 CTR.
15 THE COURT: Thank you. You can step down.
16 I'll afford the parties an opportunity to make
17 brief comment.
18 MR. LERMAN: Thank you, your Honor.
19 Ladies and gentlemen, you have heard some
20 testimony from the trustees and from one of the
21 administrators for the trustee funds and you will get
22 additional testimony to review in deliberations.
23 What the testimony shows is that the trustees
24 and the consultants did not rely on anything that the
25 tobacco companies did or said. The information

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that they

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1 relied on came from the medical community, from doctors
2 and consultants and experts. The tobacco companies did
3 not affect the decision making of the funds.
4 The second thing, ladies and gentlemen, is that
5 we agree with the plaintiffs, information matters, but we
6 also agree with the testimony of Dr. Wecker and the
7 testimony of Dr. Scheffman and the testimony of Dr. Martin
8 and the testimony of Dr. Viscusi when they testified that
9 information matters when it's new information. These
10 funds had the information they needed to make choices
11 about smoking and health. They considered choices about
12 smoking and health throughout relevant time periods and
13 chose at time times not to fund smoking cessation
14 programs. Why is that important not to criticize the
15 funds but to show that they had the information and made
16 choices for everybody in Ohio. And that's the place we
17 have to look in this lawsuit; made decisions and choices
18 with information and they had the information that
19 mattered.
20 THE COURT: Thank you. Mr. Rowe.
21 MR. ROWE: Thank you, your Honor.
22 Ladies and gentlemen, I'll be very brief
23 because I think you have already heard us on these points.
24 The reliance issue was addressed early in the
25 trial by Professor Ghilarducci that the fact that

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1 individual trustees must might not realize, it doesn't
2 mean that the fund isn't actually relying indirectly upon
3 information or misofferings from the tobacco companies.
4 And the question of common knowledge that were
5 that was addressed by so many others witnesses really has
6 nothing to do with the issues in this case.
7 Thank you.

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8 THE COURT: Thank you. We are going to take a
9 recess.
10 The way it's going to be handled, we have got
11 quite a few exhibits to go through and some other matters,
12 so we are going to stand in recess until Tuesday. But
13 before we do that, let me just ask, so the record is
14 clear. I understand that with receipt of that and subject
15 to the admission of exhibits that the defendants are at
16 this time prepared to rest?
17 MR. WEBER: Yes, your Honor.
18 MR. LERMAN: That's correct.
19 THE COURT: And on behalf the other defendants?
20 MR. BERNICK: Yes.
21 THE COURT: And do the plaintiffs have any
22 rebuttal witnesses?
23 MR. COUGHLIN: No, your Honor. We have, with
24 the same caveats, that we have exhibits we want --
25 THE COURT: Subject to the introduction of new

4377
1 exhibits you may have or the need for testimony to do
2 that.
3 We would be now in a position where the parties
4 have rested their case. Which means you have some of the
5 evidence but you still don't have all of it, because the
6 evidence includes the exhibits. More important, you don't
7 have the instructions of law to put the evidence in
8 context. So don't reach, form or express any conclusions.
9 This is going to be submitted to you next week, and at
10 that point in time, after you are concluded, you will be
11 free to talk to whoever you wish.
12 Because of the volume, and because of some
13 other obligations, we are going to stand in recess until
14 Tuesday. We have got actually quite a bit of work to do
15 before then. But you'll need to be here Tuesday morning
16 at 8:00.
17 I especially appreciate the work that juror

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18 number 5 gave today in coming in. But let me just
19 comment. It is so important for you all to be here
20 Tuesday, because you have all invested a great deal of
21 time, the parties have done, although they agreed probably
22 on little, I think they'll both accept my compliments to
23 them on the professionalism with which they have presented
24 their cases to you. You'll need to stay away from the
25 case until Tuesday.

4378

1 Be in at, again, 10 minutes until 8:00. At
2 that point in time I'm going to instruct you on what the
3 law is. The parties are going to make final arguments and
4 you will then begin your deliberations. So until that
5 time, we'll stand in recess.
6 Finally, just again a caution, all the other
7 admonitions remain in effect.
8 If any of you ever have any problems again,
9 make sure you call the Deputy Clerk. So until that time,
10 we'll stand in recess.
11 MR. COUGHLIN: Your Honor. Can we approach
12 before the we?
13 THE COURT: Why don't you go back and I'll
14 collect things and ask counsel to approach.
15 Mr. Coughlin, why don't you come up.
16 (The trial was adjourned at 4:45 p.m.,
17 Thursday, March 11, 1999 until 8:00 a.m., Tuesday, March
18 16, 1999, at which time the following proceedings were
19 conducted in open court:)
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4379

1 C E R T I F I C A T E
2 We, Richard G. DelMonico and Heide Blueskye
3 Geizer, Official Court Reporters in and for the
4 United States District Court, for the Northern District

http://legacy.library.ucsf.edu/tid/lmc05a00/pdf
Source: https://www.industrydocuments.ucsf.edu/docs/hjhd0001

5 Ohio, Eastern Division, do hereby certify that the
6 foregoing is a true and correct transcript of the
7 proceedings herein.
8
9

_____

10 Heide Blueskye Geizer,
Official Court Reporter
11
12

_____

13 Richard G. DelMonico,
Official Court Reporter
14 404 U.S. Courthouse
Two South Main Street
15 Akron, Ohio 44308
(216) 535-2280
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